SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 2

JEAN BOURDIEU, PETITIONER,

vs.

PACIFIC WESTERN OIL COMPANY, KETTLEMAN OIL CORPORATION, KETTLEMAN NORTH DOME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

VOL. I.

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San Francisco, California.

United States of America, ss.

To PACIFIC WESTERN OIL COMPANY, KETTLEMAN OIL CORPORATION, LTD., KETTLEMAN NORTH DOME ASSOCIATION, THOMAS M. CRUM, FRANK KENNEDY and FRANKLIN R. KENNEY, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 13th day of March, A. D. 1935, pursuant to order of the District Court entered in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause in equity numbered D-14-M in which JEAN BOURDIEU is Complainant and PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, THOMAS M. CRUM, FRANK KENNEDY and FRANKLIN R. KENNEY are Defendants, and Appellees; the above order allowed an appeal and you are then and there to show cause, if any there be, why the Decree entered on the 6th day of December 1934 in the said District Court against the Complainant and Appellant in the said cause of action mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES United States District Judge for the Southern District of California, this 11 day of February, A. D. 1935, and of the Independence of the United States, the one hundred and fifty-ninth.

Wm. P. James

U. S. District Judge for the Southern District of California.

[Endorsed]: Service of the foregoing Citation and receipt of copy thereof, admitted this 16th day of February, A. D. 1935. Morrison, Hohfeld, Foerster, Shuman & Clark Solicitors for Defendant, Pacific Western Oil Company. Morrison, Hohfeld, Foerster, Shuman & Clark Solictors for Defendant, Kettleman Oil Corporation, Ltd. Brobeck, Phleger & Harrison Solicitors for Defendant, Frank Kennedy. Orrick, Palmer & Dahlquist Solicitors for Defendant, Franklin R. Kennedy. George W. Nilsson Solicitors for Defendant, Kettleman North Dome Association. Filed Feb 18 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

JEAN BOURDIEU, Complainant, vs. PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, THOMAS M. CRUM, FRANK KENNEDY, C. G. SMITH, FRANKLIN R. KENNEY, OLEN LANE, M. H. GOODE, ROY E. COLLOM, JOHN DOE, JOHN DOE ONE, JOHN DOE TWO, JANE DOE, Defendants.	IN EQUITY NO. D 14-M BILL OF COMPLAINT.

To the Honorable Judges of the District Court of the United States, Southern District of California, Northern Division:

The complainant, JEAN BOURDIEU, a resident of the County of Fresno, State of California, and a citizen of the United States of America, brings this his bill of complaint against the defendants above named, and alleges as follows, to-wit:

I.

That the complainant, Jean Bourdieu, is a citizen of the United States of America, and is a resident of the County of Fresno, State of California, in the Southern District of California, Northern Division.

That the defendant, Pacific Western Oil Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen of the United States of America, and a resident of the State of Delaware.

That the defendant, Kettleman Oil Corporation, is a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen of the United States of America, and a resident of the State of California.

That the defendant, Kettleman North Dome Association, is a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen of the United States of America, and a resident of the State of California.

That the defendant, Thomas M. Crum, is a citizen of the United States of America, and a resident of the Town of Coalinga, County of Fresno, and State of California.

That the defendant, Frank Kennedy, is a citizen of the United States of America, and a resident of the City and County of San Francisco, State of California.

That the defendant, C. G. Smith, is a citizen of the United States of America, and a resident of the City and County of San Francisco, State of California.

That the defendant, Franklin R. Kenney, is a citizen of the United States of America, and a resident of the City and County of San Francisco, State of California.

That the defendant, Olen Lane, is a citizen of the United States of America, and a resident of the City of Los Angeles, County of Los Angeles, State of California.

That the defendant, M. H. Goode, is a citizen of the United States of America, and a resident of the City of Fort Worth, State of Texas.

That the defendant, Roy E. Collom, is a citizen of the United States of America, and a resident of the City of Los Angeles, County of Los Angeles, State of California.

II.

That the ground upon which the jurisdiction of this court depends in this suit is the fact that the rights of the parties hereto arise under the laws of the United States, and particularly the provisions of the Leasing Act of February 25, 1920, 41 U. S. Stats. 437, and particularly Section 20 thereof, and the right, title and interest of the parties to the subject-matter of this suit shall be determined by the construction of this law. That the value of the subject-matter of this suit is in excess of Ten Thousand Dollars ($10,000.00), plus interest, costs and expenses.

III.

That the complainant in this action is now, and at all times since the 6th day of March, 1919, has been the owner and in possession of that certain piece or parcel of land situate, lying and being in the County of Fresno,

State of California, and more particularly described and bounded as follows, to wit:

Lots 1 and 2, the East Half of the Northwest Quarter and the Northeast Quarter of Section 30, in Township 21 South, Range 17 East, M. D. B. & M., Fresno County, California, containing 322.89 acres, according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General.

IV.

That by reason of said ownership, complainant is now and has been at all times since February 25, 1920, entitled to a preference right to a permit to prospect upon said land for oil and minerals, and in case of discovery thereof, to a lease; that this right inures to complainant by reason of the provisions of Section 20 of the Leasing Act of February 25, 1920, 41 U. S. Stats. 437, as follows:

"Sec. 20. In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral rights reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; * * *"

V.

That complainant made a bona fide entry of said land as agricultural, as provided in Section 20 of the Act last hereinabove referred to; that said land was not withdrawn or classified as mineral at the time of entry, as provided for in said section; that the entry has been patented to complainant with a reservation of oil and gas to the

United States of America, under the provisions of that certain act of July 17, 1914, (38 Stats. 509); that complainant is wholly qualified under each and every provision of said Section 20, and has performed all of the obligations thereunder so as to entitle him to a preference right to a permit, and to a lease in case of discovery, all as therein provided.

VI.

That on or about the 28th day of May, 1921, defendant, Thomas M. Crum, illegally and wrongfully and with knowledge of complainant's rights, as above stated, procured a purported permit to prospect for oil and gas on a certain tract of land which included the complainant's land above described; that said permit was formerly known as United States Oil and Gas Prospecting Permit Visalia No. 09551, and is now known as United States Oil and Gas Prospecting Permit Sacramento No. 019438; that the issuance of this purported permit to said Thomas M. Crum was in violation of complainant's preference right as land owner, and operated as a complete denial of complainant's right to procure a United States oil and gas prospecting permit to prospect thereon, and to a lease in case of discovery, for the reason that no personal notice, as required by the regulations of the Department of the Interior and the provisions of Section 20 of the Leasing Act, hereinabove set forth, and no notice of any kind was given to complainant by the defendant, Thomas M. Crum, of defendant Crum's intention to apply for a prospecting permit to explore for oil and minerals on complainant's lands, and complainant had no knowledge of the issuance of said purported permit until the date hereinafter named.

VII.

Subsequently, and after issuance of the above purported permit to defendant, Thomas M. Crum, the right, title and interest in and to this permit, in so far as it affects complainant's lands, was acquired by defendant, Pacific Western Oil Company, by means and consideration, and under circumstances unknown to complainant, and that by reason of the possession of said purported permit a lease was executed by the Secretary of the Interior to the defendant, Pacific Western Oil Company, on or about the 4th day of October, 1929, all under a mistake of law, as herein set forth, and which said lease granted to the defendant, Pacific Western Oil Company, the exclusive right to drill and explore for oil and minerals on said land, and to retain the benefits accuring therefrom.

VIII.

That defendant, Pacific Western Oil Company, is now the legal owner of said lease, which it wrongfully holds in violation of complainant's prior and superior equitable rights, and the benefits thereunder, and all other rights and equities rightfully belong to complainant.

IX.

That no prospecting or drilling was ever carried on, upon complainant's land under said permit or lease, since the issuance thereof; nor is there any prospecting or drilling being carried on upon complainant's land in any form at the present time.

X.

That complainant learned for the first time about the issuance of said purported permit on or about the month of July, 1928, and he subsequently, to-wit: during the year 1930, learned that the said permit in so far as it affects this complainant's lands, had been assigned to defendant, Pacific Western Oil Company.

XI.

That complainant has no plain, speedy or adequate remedy at law for the enforcement of his rights, and for the enforcement of his rights is compelled to seek relief in this, a court of equity.

XII.

That complainant is willing to do equity, and to that end does hereby offer to defendant, Pacific Western Oil Company, to reimburse it for all moneys expended by it by reason of assessments on said land, for drilling and exploring to be carried on by the defendant, Kettleman North Dome Association, and now offers to reimburse the defendant Pacific Western Oil Company for any and all other sums of money, if any, paid by defendant, Pacific Western Oil Company to other parties unknown to complainant, by reason of holding legal title to said lease.

XIII.

That the true names, citizenship and residences of the defendants, John Doe, John Doe One, John Doe Two, and Jane Doe, are unknown to complainant, and this com-

plainant respectfully requests this Court to substitute their true names when such names are ascertained.

XIV.

That by reason of the matters and things herein alleged, the defendant, Pacific Western Oil Company, now holds title to said lease IN TRUST for this complainant.

XV.

That the defendants, Thomas M. Crum, Frank Kennedy, Kettleman Oil Corporation, Kettleman North Dome Association, C. G. Smith, Franklin R. Kenney, Olen Lane, M. H. Goode, Roy E. Collom, John Doe, John Doe One, John Doe Two, and Jane Doe, have or claim some interest in and to the premises above described, and in and to the oil and gas lease covering the same, in so far as it affects said premises, all as hereinabove set forth, adversely to this complainant, but that each and all of the claims of each and all of said defendants is, and at all times has been, without any right, and each and all of said claims are subject to and subservient to the rights of complainant hereunder.

WHEREFORE, this complainant prays that this Court render its judgment and decree as follows:

1. That defendant, Pacific Western Oil Company, holds title to the hereinabove described lease IN TRUST for this complainant, in so far as said lease affects the property described in this complaint.

2. That the defendants, Thomas M. Crum, Frank Kennedy, Kettleman Oil Corporation, Kettleman North Dome Association, C. G. Smith, Franklin R. Kennedy, Olen Lane, M. H. Goode, Roy E. Collom, John Doe, John Doe One, John Doe Two, and Jane Doe, have no right, title or interest in and to the premises above described, or in and to the oil and gas lease covering the same.

3. That the defendant, Pacific Western Oil Company, be directed to forthwith execute and deliver to this complainant a good and sufficient conveyance of said lease, in so far as it affects the premises hereinabove described, and that in default of such action within ten (10) days after entry of the decree herein, that a Commissioner be appointed by this Court, with power and instruction[illegible] to do.

4. That all of the defendants above named be compelled to account to this complainant for all sums of money, stocks, or other considerations received by them, or any of them, from said lease, and/or from said premises, and/or from said permit; and that this Court further issue its decree for the payment by defendants to the complainant of all amounts realized by complainant out of said permit, lease or property, and each and all of them, after deducting therefrom such amounts as said defendants may have, respectively, expended in connection therewith. And this complainant further prays for such other, further and different relief as to this Court may

seem meet and equitable, together with costs of suit herein incurred.

5. That the defendants, and each of them, be required to answer all and singular the matters above stated, but not under oath, answer under oath being hereby expressly waived.

6. That a writ of subpoena may be granted to complainant, to be directed to the defendants, Pacific Western Oil Company, Kettleman Oil Corporation, Kettleman North Dome Association, Thomas M. Crum, Frank Kennedy, C. G. Smith, Franklin R. Kenney, Olen Lane, M. H. Goode, Roy E. Collum, John Doe, John Doe One, John Doe Two, and Jane Doe, thereby requiring said defendants, and each of them, to be and appear on a certain day before this honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction and decree thereof as to this Court shall seem meet and equitable.

Respectfully submitted,

Chandler, Wright & Ward &
A. B. Dorman
By Howard W. Wright,
Solicitors for Complainant.

Office and Post Office Address,
631 Van Nuys Building,
Los Angeles, California.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JEAN BOURDIEU, being by me first duly sworn, deposes and says: that he is the Complainant in the above entitled action; that he has read the foregoing Bill of Complaint In Equity, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Jean Bourdieu

Subscribed and sworn to before me this 27th day of June, 1931.

[Seal] Bernice L. Lundin

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul. 1, 1931 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION

It is hereby stipulated by and between the parties to the above entitled action, through their respective counsel, that the Bill of Complaint filed herein may be amended in the following respects, to wit:

FIRST: That there be added to said Bill of Complaint a new paragraph to be numbered II-a, to read as follows, to wit:

"II-a

That on the 6th day of March, 1919, complainant above named made entry upon the lands hereinafter described, and that a copy of the Homestead Entry and a copy of the local land office receipt is attached hereto, made a part hereof, and marked "Exhibit A."

That on the 7th day of October, 1925 a patent to said lands was issued to said complainant, and that a copy of said patent is attached hereto and made a part hereof, marked "Exhibit B."

SECOND: That there be inserted in paragraph V of the Bill of Complaint on page 4, line 11, after the word "complainant" the following language, to wit:

"by reason of said entry."

THIRD: That there be stricken from paragraph V, page 4, of the Bill of Complaint after the words "Section 20" on line 12 of said page 4, the following language:

"and has performed all of the obligations thereunder."

FOURTH: And it is further stipulated that the court may take judicial notice that a document, a copy of which is attached hereto and marked "Exhibit C", was signed by the President of the United States on December 30, 1910.

FIFTH: And it is further stipulated that the motions to dismiss heretofore filed by the defendants in the above entitled action may be directed at the complaint as so amended, and that the arguments on said motions to dismiss may be heard on the 9th day of November, 1921, at 2 o'clock P. M., before Honorable Paul J. McCormick, Judge of the above entitled court, in his court room at Los Angeles, California.

CHANDLER, WRIGHT & WARD and
A. B. DORMAN,
By Howard Wright
Attorneys for Complainant

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By Herbert W. Clark
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ORRICK, PALMER & DAHLQUIST,

By.....

P. C. BLACK,

By.....

JAMES BRANN & ROWE,

By.....

GEORGE W. NILSSON,

George W. Nilsson

GEORGE R. WICKHAM

Geo. R. Wickham

(For Exhibits "A" Homestead Entry, "B" Patent, and "C" Order of Withdrawal, attached hereto, see Findings of Fact hereafter.)

[Endorsed]: Filed Nov 9, 1931 R. S. Zimmerman, Clerk By B. B. Hansen, Deputy Clerk

At a stated term, to wit: The October Term, A. D. 1931, of the District Court of the United States of America, for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Jean Bourdieu,	Plaintiff,	)
		)
vs.		) D-14-M-Eq.
		)
Pacific Western Oil Co. et al.		)
	Defendants.	)

This cause came on for hearing on motions to dismiss. Attorneys Wright (of Chandler, Wright & Ward) and A. B. Dorman appear for plaintiff; Clark (of Morrison, Hohfeld, Foerster, Shuman & Clark) appears for defendants; and Attorney Phleger (of Brobeck, Phleger & Harrison) appears for defendants James, Brann & Rowe. C. R. Triay, reporter, present.

At 2:40 p. m. counsel answer ready and it is ordered hearing proceed.

Attorney Wright makes a statement on behalf of plaintiff.

Attorney Clark argues in support of motions to dismiss.

Attorney Dorman argues in opposition to said motions on behalf of plaintiff.

Attorney Phleger argues in support of motions on behalf of defendants.

It is ordered that this matter stand submitted on filing of last brief, briefs to be filed 10 x 10 x 10.

At 4:30 p. m. court adjourns.

At a stated term, to wit: The October Term, A. D. 1932, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 20th day of October in the year of our Lord one thousand nine hundred and thirty-two.

Present:

The Honorable: Paul J. McCormick, District Judge.

Jean Bourdieu,	Plaintiff,	)
		)
vs.		) No. D-14-M-Eq.
		)
Pacific Western Oil Company, a corp., et al,		)
		)
	Defendants.	)

The Court makes the following order in this case:

Because of doubt existing as to how far this court may judicially know public and geographical matters on a motion to dismiss a bill in Equity without a hearing of the suit on the merits, it is ordered that all motions to dismiss this suit and the amended complaint thereof, at this time, be denied without prejudice to any renewal of any of the motions to dismiss at the time of hearing of this suit on the merits. Exceptions to the aforesaid order are fully noted and reserved for each movent defendant.

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT PACIFIC WESTERN OIL COMPANY, A CORPORATION, TO THE AMENDED BILL OF COMPLAINT.

The defendant, Pacific Western Oil Company, a corporation, not waiving but expressly reserving its right to have this cause dismissed as set forth in its original motion to dismiss herein, for its separate answer to the complainant's amended bill of complaint herein states:

I.

Answering the allegations contained in paragraph I of the said amended bill of complaint herein, this defendant states that it is without knowledge as to whether the complainant is a resident of the County of Fresno, State of California, and a citizen, or a citizen, of the United States of America.

It is informed and believes that the defendant Kettleman Oil Corporation, Ltd., sued herein as Kettleman Oil Corporation, is a Delaware corporation, a resident of the said State of Delaware, and a citizen of the United States of America.

II.

Answering the allegations contained in paragraph II of the amended bill of complaint herein, this defendant denies that the right, title and interest, or the right, title or interest, of the parties to the subject-matter of this suit shall be determined by the construction of the so-called Leasing

Act of February 25, 1920, 41 Statutes at Large, 437, and in this behalf alleges that the right, title and interest of the parties to the subject-matter of the suit herein are to be determined by the construction of the said Leasing Act and other laws of the United States and by the facts to be and which may be shown in evidence herein.

III.

Answering the allegations contained in paragraph III of the amended bill of complaint herein, this defendant denies that the complainant in this action is now, and at all times since the 6th day of March, 1919, or is now or at all times or at any time since the 6th, day of March, 1919, has been the owner and in possession, or the owner or in possession, of that certain piece or parcel of land situate, lying and being in the County of Fresno, State of California, and more particularly described and bounded as in lines 13 to 17, consecutive and inclusive, on page 3, in paragraph III, of the said amended bill of complaint set out; and in this behalf this defendant alleges that the complainant in this action is now, and at all times since the 6th day of March, 1919, has been, the owner of the said parcel of land described in said paragraph III of the said amended bill of complaint, subject, however, to an exception and reservation to the United States of all the oil and gas in the said lands, and to an exception and reservation to the United States, and to persons authorized by it, of the right to prospect for, mine, and remove such deposits of oil and gas from the said lands upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914, 38 Statutes at Large 509; and in this behalf this defendant alleges further that under date of March 6, 1919, the complainant herein filed

with the United States Land Office, at Visalia, California, his application and affidavit to enter, under the Act of February 19, 1909, 35 Statutes at Large 639, the lands described in said paragraph III of the amended bill of complaint herein, containing 322.89 acres, that the said application and affidavit were expressly made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914, 38 Statutes at Large 509, and that said application when so filed as aforesaid in the United States Land Office, contained in writing the express statement that it was "Subject to provisions and reservations and limitations of Act of July 17, 1914"; that thereafter and under date of October 7, 1925, the United States of America issued to the complainant herein its certain instrument of quitclaim commonly known as and called a patent in which there was described the said lands which are described in said paragraph III of the amended bill of complaint herein, and which said patent also contained the following language, to wit: "Now know ye, that there is, therefore, granted by the United States unto the said claimant the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States. Also excepting and reserving to

the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509)".

IV.

Answering the allegations contained in paragraph IV of the said amended bill of complaint, this defendant denies that by reason of said ownership, or by reason of said alleged ownership, the complainant is now and has been, or is now or has been, at all or any time or times, or at all, since February 25, 1920, entitled to a preference right to a permit to prospect upon said land for oil and minerals, or for oil or minerals, and in case of discovery thereof, or in case of discovery thereof, to a lease; denies that this alleged right inures to complainant by reason of the provisions of section 20 of the Leasing Act of February 25, 1920, 41 Statutes at Large 437, or by reason of any of said provisions, or at all.

V.

Answering the allegations contained in paragraph V of the said amended bill of complaint, this defendant denies that the complainant herein made a bona fide entry of said land as agricultural, as provided in section 20 of the act mentioned in said paragraph V of the said amended bill of complaint; denies that said land was not withdrawn or classified as mineral at the time of entry, as provided for in said section 20 of the said Leasing Act; denies that the complainant herein, by reason of said entry, or otherwise or at all, is wholly or at all qualified under each and

every, or under each or every, provision of said section 20 of the said Leasing Act, or is qualified under any section or provision of said section 20, or was qualified under said section 20 at any time prior to the 4th day of October, 1929, so as to entitle him to a preference right to a permit, and to a lease, or to a lease, in case of discovery.

And, further answering the allegations contained in said paragraph V of the amended bill of Complaint herein, this defendant alleges that on or about the 30th day of December, 1910, and pursuant to the recommendation of the Acting Director of the United States Geological Survey, the President of the United States of America executed, issued, and caused to be promulgated a certain Executive Order, a copy of which, together with a copy of the written recommendation of the said Acting Director of the United States Geological Survey, is hereto annexed, marked Exhibit "A", hereby referred to and, by such reference, made a part of this answer as fully and to the same extent and effect as if it were set out at large in this paragraph; that the lands described in paragraph III of the said amended bill of complaint herein are and at all times in the said amended bill of complaint mentioned have been within the exterior limits of Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian, in the State of California, and that the said Section 30 is described in and was and is included within the operation and effect of the said Executive Order; and that the said Executive Order has at all times been and now remains in all respects unrevoked and unmodified and has at all times been and now is in all respects in full force and effect, except that the aforesaid Leasing Act of February 25, 1920 authorized and permitted the Secretary of the Interior, un-

der such necessary and proper rules and regulations as he might prescribe, to grant prospecting permits upon the lands described in the said Executive Order and, upon discovery of valuable deposits of oil or gas within the limits of the land embraced in any such permit, to issue leases in respect thereof, all as provided in the said Leasing Act.

VI.

Answering the allegations contained in paragraph VI of the said amended bill of complaint, this defendant denies that on or about the 28th day of May, 1921, or at any time whatsoever, or at all, defendant Thomas M. Crum illegally and wrongfully and with knowledge, or illegally or wrongfully or with knowledge, of complainant's rights, procured a purported permit to prospect for oil and gas on a certain tract of land which included the complainant's land as described in paragraph III of the said amended bill of complaint; denies that the issuance of the said alleged purported permit to the said Thomas M. Crum was in violation of complainant's preference right as land owner, and operated or operated as a complete denial, or as a denial, of complainant's alleged right to procure a United States Oil and Gas Prospecting Permit to prospect on the said land, and to a lease or to a lease in case of discovery, for the reason that no personal notice and no notice, or no notice, of any kind was given to complainant by the said defendant Crum of said Crum's intention to apply for a prospecting permit to explore for oil and minerals, or oil or minerals, on complainant's lands, and denies, upon information and belief, that complainant had no knowledge of the issuance of the said permit until the date

in paragraph X of the said amended bill of complaint mentioned. And further answering the allegations contained in said paragraph VI, this defendant alleges, upon information and belief, that the complainant herein knew of the issuance of the permit mentioned in said paragraph VI as early as May 28, 1921, the date of the issuance thereof.

VII.

Answering the allegations contained in paragraph VII of the said amended bill of complaint, this defendant denies that after the issuance of the permit mentioned in said paragraph to the defendant Thomas M. Crum, the right, title and interest in and to this permit, or the right, title or interest in or to this permit, in so far as it affects complainant's lands, was acquired by defendant Pacific Western Oil Company, and that or that by reason of the possession of said purported permit a lease was executed by the Secretary of the Interior to the defendant Pacific Western Oil Company on or about the 4th day of October, 1929, all under a mistake of law, as set forth in the said amended bill of complaint, or otherwise, or at all, and which or which said lease granted to the defendant Pacific Western Oil Company the exclusive right to drill and explore or to drill or explore for oil and minerals or for oil or minerals on said land, and to retain or to retain the benefits accruing therefrom. And in this behalf this defendant alleges that on and prior to May 28, 1921, the lands described in paragraph III of the said amended bill of complaint herein were not within any known geological structure of a producing oil or gas field; that at and before said last mentioned date and at all times thereafter such oil or gas as was within the said lands be-

longed to the United States; that on or about said last mentioned date the Secretary of the Interior issued to the said Thomas M. Crum United States Oil and Gas Prospecting Permit Visalia No. 09551, now Sacramento No. 019438, covering the lands described in paragraph III of the amended bill of complaint herein and other lands; that thereafter, and on the 8th day of March, 1929, by divers mesne conveyances the said oil and gas prospecting permit and the rights and privileges of the original permittee therein and thereunder became vested in Kettleman Oil Corporation, a corporation, and Pacific Western Oil Company, a corporation, in the proportions of an undivided one-half interest thereof to each of said last named corporations; that thereafter and on the 4th day of October, 1929, the United States of America, by its Acting Secretary of the Interior, executed and issued to the said Kettleman Oil Corporation and the said Pacific Western Oil Company, under the provisions of the said Leasing Act of February 25, 1920, a lease of certain oil and gas lands which included and now includes the lands described in paragraph III of the amended bill of complaint herein.

VIII.

Answering the allegations contained in paragraph VIII of the said amended bill of complaint herein, this defendant denies that the defendant Pacific Western Oil Company is now the legal owner of the said lease; denies that Pacific Western Oil Company wrongfully holds the said lease in violation of complainant's prior and superior, or prior or superior, equitable rights; and denies that the benefits, or any thereof, under the said lease and all or all or any other rights and equities or rights or equities rightfully belong to the complainant herein; denies that Ket-

tleman Oil Corporation and Pacific Western Oil Company, or either of them, wrongfully hold or wrongfully holds the aforesaid lease in violation of complainant's prior and superior equitable rights or prior or superior equitable rights, and denies that the benefits, or any thereof, under the said lease, and all other rights and equities or all other rights or equities rightfully belong to the complainant herein. And in this behalf this defendant alleges that Pacific Western Oil Company and Kettleman Oil Corporation are now the legal and equitable owners of the said lease and of all interests and rights therein.

IX.

Answering the allegations contained in paragraph IX of the amended bill of complaint herein, this defendant denies that no prospecting was ever carried on upon the lands described in paragraph III of the said amended bill of complaint under said permit or lease after the issuance of either the said permit or lease; and denies that the land described in said paragraph III of the amended bill of complaint is complainant's land.

X.

Answering the allegations contained in paragraph X of the amended bill of complaint herein, this defendant denies that the complainant learned for the first time about the issuance of said purported permit on or about the month of July, 1928, and he subsequently, or he subsequently, to wit, during the year 1930, learned that the said permit in so far as it affects the complainant's alleged lands, had been assigned to defendant Pacific Western Oil Company. And in this behalf this defendant alleges, upon information and belief, that on or about the 28th day of

May, 1921, the complainant herein for the first time learned about the issuance of the said permit to the defendant Thomas M. Crum and, upon information and belief, that the said complainant knew of the issuance of the said lease at the date of the issuance thereof.

XI.

Answering the allegations contained in paragraph XI of the amended bill of complaint herein, this defendant denies that the complainant has no plain, speedy, or adequate remedy at law for the enforcement of his alleged rights, or any thereof, and for the enforcement or for the enforcement of his rights, or any thereof, is compelled to seek relief in this a court of equity.

XII.

Answering the allegations contained in paragraph XIV of the amended bill of complaint herein, this defendant denies that by reason of the matters and things, or of the matters or things, or any thereof, in the said amended bill of complaint alleged, the defendant Pacific Western Oil Company now holds title to said lease in trust for the complainant, or that either the Pacific Western Oil Company or Kettleman Oil Corporation, or both, now holds or now hold title to said lease in trust for the complainant herein.

XIII.

Answering the allegations contained in paragraph XV of the amended bill of complaint herein, this defendant states that it is without knowledge as to whether Franklin R. Kenney has or claims an interest in and to or in or to the premises described in paragraph III of the said

amended bill of complaint, and in and to or in or to the oil and gas, or the oil or gas, lease covering the same, in so far as it affects said premises, or at all, adversely to the complainant herein; and this defendant denies that the claims of the defendants Kettleman Oil Corporation and Pacific Western Oil Company in and to the said premises, and in or in and to the oil and gas lease covering the same, in so far as the said lease affects the said premises, are, and at all times, or at all or any time or times whatsoever have been, without any right, and that or that each and all or each or all, or any, of such claims of said last named defendants are subject to and subservient, or are subject to or subservient, to the alleged rights of the complainant herein.

XIV.

And further answering the allegations contained in the said amended bill of complaint, this defendant alleges that there are no facts set out therein which entitles the said complainant to relief in equity as commanded.

XV.

And further answering the allegations contained in the said amended bill of complaint herein, this defendant alleges that it appears on the face of the said amended bill of complaint that the complainant's cause of complaint is stale, and that it would be contrary to equity and good conscience for this court to take cognizance thereof, and that the complainant's laches and delay are not excused by the matter set up in paragraphs VI, IX and X of the said amended bill of complaint, or elsewhere in the said amended bill of complaint.

XVI.

And further answering the allegations contained in the said amended bill of complaint, this defendant alleges that there is a defect of parties to the said suit in that the United States of America is not either a party plaintiff or complainant or defendant, although the amended bill of complaint herein on its face shows that the United States of America is an indispensable party to a complete determination of the said suit.

XVII.

And further answering the allegations contained in the said amended bill of complaint herein, this defendant states that it is without knowledge whether the complainant was a citizen of the United States of America at any time prior to the 7th day of October, 1925.

XVIII.

And by way of counterclaim against the complainant herein, this answering defendant alleges:

(a) That each of the defendants, Pacific Western Oil Company and Kettleman Oil Corporation, Ltd., is and at all times in the said amended bill of complaint mentioned was a corporation organized and existing under and by virtue of the laws of the State of Delaware. At all times prior to the 4th day of October, 1929, the name of Kettleman Oil Corporation, Ltd., was Kettleman Oil Corporation, and subsequently to said last mentioned date the name of the said corporation was changed from Kettleman Oil Corporation to Kettleman Oil Corporation, Ltd.

(b) That on or about the 4th day of October, 1929, the United States of America granted and leased to Pacific Western Oil Company and Kettleman Oil Corporation, now Kettleman Oil Corporation, Ltd., as parties of the second part therein, the exclusive right to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the Northeast Quarter (NE¼) Section 20, Lots 1, 2, East Half (E½) Northwest Quarter (NW¼) and Northeast Quarter (NE¼) Section 30, and North Half (N½) Northeast Quarter (NE¼) Section 32, Township 21 South, Range 17 East, Mt. Diablo Meridian, California; that the said grant and lease were made under the Act of February 25, 1920, 41 Statutes at Large 437, and in and by a certain indenture of lease, a copy of which is hereto attached, marked Exhibit "B", and by reference made a part of this answer as fully and to the same extent as if it were set out at large in this paragraph; and that the said corporations last named are now and since the date of the said lease, Exhibit "B", have been the owners of and in the possession of an estate for years in and to the same for the term and terms, period and periods, and pursuant to the covenants, conditions, and agreements of lease thereof from the said United States of America as set forth in the original of said Exhibit "B", each of said corporations being the owner of and in the possession of, and entitled to the possession of, an undivided one-half interest thereto and therein for the term and terms, period and periods, and

pursuant to the covenants and agreements, of the said lease thereof from the said United States of America, to the said defendants, being Exhibit "B", attached to and made a part of this answer.

(c) That the complainant herein claims and asserts that the said two defendant corporations, last mentioned, and that this answering defendant corporation, have and has no right, title, interest, or claim whatsoever or at all in or to the oil or gas deposits under Lots 1 and 2, the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section 30, in Township 21 South, Range 17 East, Mt. Diablo Meridian, California, or in or to any estate or interest therein, and that the aforesaid lease, Exhibit "B" to this answer, is and was, as to the said complainant herein, illegally and wrongfully issued and delivered to said Pacific Western Oil Company and Kettleman Oil Corporation and that the said two corporations wrongfully hold the said lease as against the said complainant herein and that in so far as the said lease affects oil or gas under the land last above described, the two last named corporations hold the same in trust for the complainant herein; but this answering defendant alleges that the said claims and assertions of the complainant herein are, and each of them is, without right whatsoever, and that the complainant herein neither has nor owns any estate, right, title or interest whatsoever in or to the oil or gas under the said land or in or to any part or parcel thereof.

WHEREFORE, the premises considered, this answering defendant prays that complainant may take nothing by reason of his said amended bill of complaint herein, that this defendant may have and recover of and from the said complainant its costs in this behalf sustained, and, upon the counterclaim of this defendant, that title in and to an undivided one-half interest to the aforesaid estate for years described in the said lease, Exhibit "B", may be quieted against the adverse claims of the complainant herein; that this defendant may be adjudged and decreed to be the owner of an undivided one-half of said estate for years for the term and terms, period and periods, and pursuant to the covenants, conditions and agreements of the aforesaid lease; that the said lease and the covenants, conditions and agreements therein are valid as against the complainant herein, and that the said complainant be barred from any and all claim of right, or title to the said estate for years and every part and parcel thereof, adverse to the defendant therein and thereto; and for its costs sustained in connection with this counterclaim, and for such other and further relief as to the court may seem meet, equitable and proper in the premises.

Felix T. Smith

Pillsbury, Madison & Sutro

Herbert W. Clark

Morrison, Hohfeld, Foerster, Shuman & Clark

Solicitors for defendant Pacific Western Oil Company, a corporation.

STATE OF CALIFORNIA,)
) ss.
City and County of San Francisco.)

HERBERT W. CLARK, being first duly sworn, deposes and says:

That he is a member of the law partnership of Morrison, Hohfeld, Foerster, Shuman & Clark, solicitors for the defendant Pacific Western Oil Company in the above entitled suit, and that said company is absent from the City and County of San Francisco, State of California, where this affiant has his office, and no officer of said company is now within the City and County of San Francisco; that he has read the foregoing answer to the amended bill of complaint in said suit, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Herbert W. Clark

Subscribed and sworn to before me this 19th day of December, 1932.

[Seal] W. W. Healey

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

~~7-1~~ ~~112273-1~~
4—1

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
WASHINGTON

Office of the Director

December 28, 1910

The Honorable,

The Secretary of the Interior.

Sir:

Information received from the field indicates that the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action:

Very respectfully,
H. C. Rizer
Acting Director.

December 29, 1910.
Respectfully referred to the President with favorable recommendation.
ECF

Frank Pierce
Acting Secretary.

[Stamped]: Received Jan 3 1911

[Stamped]: [Illegible]

[Stamped]: 99358 Received G. L. O. Jan. 3, 1911 Referred to . . . Assigned to W. P. W. Answered by . . . . Remainder illegible.

[Written]: To R & R Visalia 1/3/11 W P W 'N. Dated 1-5-11 [illegible]

SPECIAL

December 30, 1910.

ORDER OF WITHDRAWAL

Petroleum Reserve No. 16—California No. 7.

It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910:

— ~~142734-2~~
7—2

Oil—California No. 7, p. 2.

Mt. Diablo Meridian, California.

T. 20 S., R. 16 E., Sec. 25, SW¼;
Sec. 26, all;
Sec. 34, E½;
Sec. 35, all;
Sec. 36, all.
T. 21 S., R. 16 E., Sec. 1, all;
Sec. 2, all;
Sec. 3, S½;
Sec. 4, N½ of NW¼, SE¼ of NW¼, NE¼ of SW¼, SE¼;

Sec. 9, N½ of NE¼, SE¼ of NE¼, NE¼ of SE¼;

Sec. 10, all;

Sec. 11, all;

Sec. 12, all;

Sec. 13, all;

Sec. 14, all;

Sec. 15, NE¼, N½ of NW¼, SE¼ of of NW¼, N½ of SE¼, SE¼ of SE¼;

Sec. 23, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

Sec. 24, all;

Sec. 25, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

T. 20 S., R. 17 E., Sec. 31, SW¼;

T. 21 S., R. 17 E., Sec. 6, all;

Sec. 7, all;

Sec. 8, all;

Sec. 16, W½ of NW¼, SW¼;

Sec. 17, all;

Sec. 18, all;

Sec. 19, all;

Sec. 20, all;

Sec. 21, W½ of NE¼, W½, W½ of SE¼, SE¼ of SE¼;

Sec. 26, SW¼ of SW¼;

Sec. 27, W½ of NW¼, SE¼ of NW¼, S½;

Sec. 28, all;

Sec. 29, all;

Sec. 30, all;

Sec. 31, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼;

Sec. 32, N½, N½ of SW¼, SE¼.

T. 22 S., R. 17 E., Sec. 4, NW¼, E½ of SW¼.

99552-2

— ~~1422734 3~~

7—3

Oil—California, p. 3.

The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres.

Wm H Taft

President.

Referred to the Commissioner of the General Land Office for appropriate action. ECF

R A Ballinger

Secretary.

99552-3

EXHIBIT "B"

98 # I

Exhibit No. Two—6"
Identified by William A Bedle

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Serial Sacramento 019438 (d)
Lease of Oil and Gas Lands Under the Act of
February 25, 1920
.14-13

This Indenture of Lease, entered into, in triplicate, as of the 4th day of October, 1929, by and between the UNITED STATES OF AMERICA, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and Kettleman Oil Corporation, and Pacific Western Oil Company, Delaware Corporations, party of the second part, hereinafter called the lessee, reference being made to an agreement dated July 25, 1929, to be considered in connection herewith, accepted and approved by the Department of the Interior on November 22, 1929, being a covenant with and by and between this lessee and certain other permittees and/or lessees and the Secretary of the Interior, said agreement regulating, controlling and governing the development and production of the North Dome, Kettleman Hills Oil and Gas Field, California, under, pursuant, and subject to the terms and provisions of the Act of Congress approved February 25, 1920 (Public No. 146), entitled "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale,

Gas, and Sodium on the Public Domain," hereinafter referred to as the act, which is made a part hereof, WITNESSETH:

SEC. 1. *Purposes.*—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described tract of land situated in the North Dome, Kettleman Hills Oil Field and more particularly described as follows:

NE¼ Sec. 20, Lots 1, 2, E½ NW¼ and NE½ Sec. 30, and E½ NE¼ Sec. 32, T. 21 S., R. 17 E., M. D. M., California, containing 562.89 acres.

together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

(1)

Serial .....

SEC. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish a bond with approved corporate surety in the penal sum of $5,000, conditioned upon compliance with the terms of the lease.

(b) Wells.—To maintain in a state of production wells equal in number to the number of the now existing producing wells on the leased land until the oil deposits are exhausted or until the proven territory has been drilled, and in case such existing wells are less than the number of 40-acre tracts or lots embraced in the lease, to proceed with reasonable diligence within three months of delivery hereof to install on the leased land a standard or other efficient drilling outfit and equipment, and to commence drilling at least one well and to continue such drilling with reasonable diligence to production or to a point where the well is demonstrated unsuccessful, and thereafter to continue drilling with reasonable diligence at least one well at a time until the lessee shall have drilled producing wells which, with any producing wells now on the land, equal in number the number of 40-acre tracts or lots embraced in the leased premises, unless the lessor shall for any reason deemed sufficient consent in writing to the drilling of a less number of wells; the lessee further agrees to drill all necessary wells to offset the wells of others on adjoining land or deposits not the property of the United States, and on adjoining land operated under Government lease at 5 per cent royalty.

(c) Royalty and Rents.—To pay the lessor in advance, beginning with the date of the execution of this lease, a rental of one dollar per acre per annum during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty on all oil and gas produced from the land leased

herein (except oil or gas used for production purposes on said land or unavoidably lost), as follows:

(1) For all oil produced of 30° Baumé or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month	12½ per cent.
On that portion of the average production per well of more than 20 barrels and not than 50 barrels per day for the calendar month	16⅔ per cent
On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	20 per cent.
On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month	25 per cent.
On that portion of the average production per well of more than 200 barrels per day for the calendar month	33⅓ per cent.

(2) For all oil produced of less than 30° Baumé:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month	12½ per cent.
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	14²/₇ per cent.

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month..... 16⅔ per cent.

On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month..... 20 per cent.

On that portion of the average production per well of more than 200 barrels per day for the calendar month..... 25 per cent

Only wells which have a commercial production during at least part of the month shall be considered in ascertaining the average production above provided for; and the Secretary of the Interior shall determine what are commercially productive wells under this provision.

(2)

100

(3) On gas and casing-head gasoline:

On gas, whether same shall be gas from which the casing-head gasoline has been extracted or otherwise, 12½ per cent of the value thereof in the field where produced where the average production per day for the calendar month from the land leased is less than 3,000,000 cubic feet, and 16⅔ per cent where the average daily production is 3,000,000 cubic feet or over.

On casing-head gasoline, 16⅔ per cent of the value of the casing-head gasoline extracted from the gas produced and sold, computed on the basis provided for in the operating regulations.

The value in the field where produced, of gas and casing-head gasoline, for royalty purposes, unless such gas or casing-head gasoline is disposed of under an approved sales contract or other method as provided in subdivision (*d*) of this section, shall be as fixed by the Secretary of the Interior.

In cases where the gas produced and sold has a value both for casing-head gasoline content and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on both of such values.

When paid in value, such royalties shall be due and payable monthly on the 15th of each calendar month following the calendar month in which produced, to the Receiver of Public Moneys of the land district in which the land is situated; when paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced, unless otherwise agreed to by the parties hereto, at such times as may be required by the lessor; *Provided*, That the lessee shall not be required to hold such royalty oil in storage longer than thirty days after the end of the calendar month in which said oil is produced: *And provided further*, That the said lessee shall be in no manner responsible or held liable for the loss or destruction of such oil in storage from causes over which the lessee has no control such royalties, whether in value or kind, shall be subject to reduction whenever the

average daily production of any oil well shall not exceed ten (10) barrels per day, if in the judgment of the lessor the wells cannot be successfully operated upon the royalties fixed herein.

(d) Sales contracts.—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) Monthly statements.—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the department.

(f) Plats and reports.—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders' investment, depreciation, and cost of operation, together with a statement

as to the amount and grade of oil and gas produced and sold, and the amount received therefor by operations hereunder.

(g) Log of wells.—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log, or copy thereof, shall be furnished to said lessor on demand.

(h) Diligence—Prevention of waste—Health and safety of workmen.—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby, while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely any well before abandoning the same so as to effectually shut off all water from the oil or gas bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to

prevention of waste, and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at the lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: *Provided,* That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(*i*) *Taxes and wages—Freedom of purchase.*—To pay when due, all taxes lawfully assessed and levied under the laws of the State upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(*j*) *Reserved deposits.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(*k*) *Assignment of lease.*—Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(*l*) *Deliver premises in cases of forfeiture.*—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture

of this lease; but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

Sec. 3. The lessor expressly reserves:

(*a*) *Rights reserved—Easements and rights of way.*—The right to permit for joint or several use easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(*b*) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(*c*) *Pipe lines to convey at reasonable rates.*—The right to require the lessee, his assignees or beneficiary, if owner or operator of, or owner of a controlling interest in, any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discrimination the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act.

(*d*) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section

30 of the act to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(*e*) *Helium.* Pursuant to section 1 of the act, the lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium, the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *Provided.* That the lessee shall not, as a result of the operation in this section provided for, suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

Sec. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired;

but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Sec. 5. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within six months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen; pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not, within six months, elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within ninety days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells.

Sec. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Sec. 7. *Heirs and successors in interest.*—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

Sec. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Re-

vised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1919 (35 Stat., 1109) relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

IN WITNESS WHEREOF

THE UNITED STATES OF AMERICA,

By Jos. M. Dixon

Acting Secretary of the Interior.

KETTLEMAN OIL CORPORATION,

By Eric Gowan

Vice-President

Witness to signature of

KETTLEMAN OIL CORPORATION

W. W. Simcox

Gene Laswell

PACIFIC WESTERN OIL COMPANY,

By W. C. McDuffie

President

By Harry O. Ravis

Secretary

Witness to signature of—

Pacific Western Oil Co.

H. O. R.

Emily Irene Huyler

Marie Raleigh

State of California
} ss.
COUNTY OF LOS ANGELES

On this 11th day of December A. D., 1929, before me, Harry H. Lyman a Notary Public in and for the said County and State, personally appeared E. McGowan known to me to be the Vice-President, ~~and~~.....
H. H. L N. P.
~~known to me to be the Secretary~~ of the KETTLEMAN OIL CORPORATION the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Harry H. Lyman
Notary Public in and for said County and State.

My commission expires June 9, 1933

State of California }
COUNTY OF LOS ANGELES } ss.

On this 11th day of DECEMBER A. D., 1929, before me, EMILY IRENE HUYLER, a Notary Public in and for the said County and State, personally appeared WM. C. McDUFFIE known to me to be the President, and HARRY O. RAVIS known to me to be the Secretary of the PACIFIC WESTERN OIL COMPANY the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Emily Irene Huyler
Notary Public in and for said County and State.

My Commission Expires Jan. 11, 1931

[Endorsed]: Filed Dec. 20, 1932 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

[Note:—Answer of Kettleman Oil Corp. is identical in content and form with foregoing Answer of Pacific Western Oil Co.]

[TITLE OF COURT AND CAUSE.]

STIPULATION

IT IS STIPULATED by and between solicitors for the complainant and the defendant Kettleman North Dome Association that said defendant may adopt as part of its answer any part or all of the answers of the defendants Pacific Western Oil Company and/or Kettleman Oil Corporation, and that said defendant may adopt as its cross-complaint any part or all of the cross-complaints filed by the defendants Pacific Western Oil Company and Kettleman Oil Corporation.

Datel: December 22, 1932.

CHANDLER, WRIGHT & WARD
By Howard W. Wright
A. B. Dorman
Solicitors for Complainant

George W. Nilsson
Solicitor for Defendant
KETTLEMAN NORTH DOME ASSOCIATION

[Endorsed]: Filed Dec. 23, 1932. R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT KETTLEMAN NORTH DOME ASSOCIATION TO BILL OF COMPLAINT AS AMENDED.

Comes now the defendant KETTLEMAN NORTH DOME ASSOCIATION, a California non-profit corporation, and not waiving but expressly reserving, its right to have this cause dismissed, as set forth in its motion to dismiss filed herein, for its separate answer to complainant's bill of complaint as amended, admits, denies and alleges as follows:

FIRST DEFENSE
I - XVII

As Paragraphs I to XVII of its first defense, this defendant adopts Paragraphs I to XVII of the answers filed herein by the defendants Pacific Western Oil Company and Kettleman Oil Corporation, and makes the same a part hereof as though fully set forth at length at this point.

SECOND DEFENSE

Defendant Kettleman North Dome Association for a further, separate and additional defense to the complainant's bill of complaint as amended, admits, denies and alleges as follows:

I

Denies each and every, all and singular the allegations of Paragraph IV of complainant's bill of complaint as amended, and denies that the complainant has any right,

title or interest in or to the oil or gas in or under, or produced from, the lands described in his bill of complaint as amended, or any portion thereof, and denies that the complainant has any right to prospect for, mine or remove any oil or gas from said lands, or any part thereof.

Alleges that the claim of the complainant herein to the oil, gas or other hydrocarbons in or under, or removed from, the lands described in his bill of complaint as amended, or any portion thereof, and his claim to the right to prospect for, mine or remove such deposits from the same are, and each of them is, without right whatsoever, and this defendant alleges that the complainant herein neither has, nor owns, any estate, right, title or interest whatsoever in or to the oil, gas or other hydrocarbons in or under said lands, or any parcel thereof, or in or to any oil, gas or other hydrocarbons produced and removed from said lands, or any part thereof.

II

This defendant admits that it claims an interest and estate in the premises described in complainant's amended bill of complaint, as more fully set forth herein.

III

That the Kettleman North Dome Association is a non-profit cooperative corporation, organized under the laws of the State of California, for the purpose of the unified development of oil, gas and other hydrocarbons from the North Dome of Kettleman Hills in Fresno and Kings Counties, California.

IV

That on or about January 31, 1931 an agreement, hereinafter referred to as the "Unit agreement", for the operation

of their lands in the North Dome of Kettleman Hills, was entered into among fourteen operators of oil lands and leases on the North Dome of Kettleman Hills, and the Kettleman North Dome Association, and said operators became, and now are, members of said Association.

That Pacific Western Oil Company and Kettleman Oil Corporation, as the owners of lands and leases in the North Dome area of Kettleman Hills, joined in, and executed said Unit Agreement, and became, and now are, members of this Association.

V

That the Kettleman North Dome Association was organized, and the Kettleman North Dome Unit Agreement was entered into, between the Association and its members, pursuant to statutory authority as provided by an Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain, approved February 25, 1920 (41 U. S. Statutes at Large, 437, generally known as the Federal Oil and Gas Leasing Act), as amended by an Act to amend Sections 17 and 27 of the General Leasing Act of February 25, 1920, as amended, approved July 3, 1930, (46 U. S. Statutes at Large, 1007), and by Section 8 (c) of an Act to protect the natural resources of petroleum and gas from waste and destruction, being Chapter 535 Statutes of California, 1929 (the California Gas Conservation Act.)

VI

That the Unit Agreement was approved by the State Oil and Gas Supervisor of the State of California, on January 21, 1931, and was approved by the Secretary of the Interior of the United States on January 31, 1931.

On the same date, the Secretary of the Interior certified that the unit plan of development and operation contemplated in said agreement was necessary and advisable in the public interest, and said Unit Agreement became effective on that date.

VII

This defendant is informed and believes, and therefore alleges, that for a long time prior to the 31st day of January, 1931, the complainant knew that the Kettleman North Dome Association was being formed, and that the possession and operation of the lands described in complainant's amended bill of complaint, title to which is claimed by him, was to be turned over to the Association by Pacific Western Oil Company and Kettleman Oil Corporation, and complainant failed to give any notice to the Kettleman North Dome Association of his interest in, or claim to, said land, or any portion thereof, except his right to occupy the surface of said land under a homestead patent, in which patent the right to prospect for, mine and remove oil and gas is expressly reserved to the Government of the United States, or to persons authorized by it to prospect for, mine or remove such deposits from such land.

That the complainant has been guilty of laches and is estopped from claiming any right against this defendant in or to the oil, gas or other hydrocarbons in or under, or produced from, the lands described in his amended bill of complaint, or any portion thereof, and is estopped from claiming any right to prospect for, mine or remove from said lands any oil, gas or other hydrocarbons.

VIII

That among other lands held under lease from the Government of the United States by Pacific Western Oil Company and Kettleman Oil Corporation, is the land described in complainant's amended bill of complaint herein.

That on or about October 4, 1929, the Secretary of the Interior of the United States, acting for and on behalf of the United States, issued a lease to the defendants Kettleman Oil Corporation and Pacific Western Oil Company, as lessees, being Lease No. Sacramento 019438(d). That said lease included, among other property, the lands described in Paragraph III of complainant's bill of complaint as amended; that said grant and lease were made under the Act of February 25, 1920 (41 U. S. Statutes at Large, 437, generally known as the Federal Oil and Gas Leasing Act). That a photostatic copy of said lease is attached to each of the answers of the Kettleman Oil Corporation and Pacific Western Oil Company, to which reference is hereby made for the details of said lease.

That said lease is in full force and effect, and is owned by the defendants Pacific Western Oil Company and Kettleman Oil Corporation, subject to the terms and conditions of the Kettleman North Dome Unit Agreement, hereinabove referred to.

IX

That pursuant to the terms of the Kettleman North Dome Unit Agreement, the operation and development of the lands and leases held by the Pacific Western Oil Company and Kettleman Oil Corporation on the North Dome of Kettleman Hills, including the lands covered by

the lease just described, which includes the lands described in complainant's amended bill of complaint, were turned over to the Kettleman North Dome Association on April 1, 1931, and since said date this Association has been, and now is, developing and operating the lands and leases of the Pacific Western Oil Company and Kettleman Oil Corporation on the North Dome of Kettleman Hills, including the lands described in complainant's bill of complaint as amended.

That the Kettleman North Dome Association took possession of the land described in complainant's amended bill of complaint on April 1, 1931, without any knowledge or notice of the claim of any interest in said land made by complainant, and said Association has expended large sums of money in the development of said land, in connection with other lands of Pacific Western Oil Company and Kettleman Oil Corporation, and other members of the Association, in carrying out the terms of the Kettleman North Dome Unit Agreement in the unified development and operation of the North Dome of Kettleman Hills.

X

That the Kettleman North Dome Association is entitled to the exclusive possession of the land described in complainant's amended bill of complaint, for the purpose of development and operation, for the production of oil, gas and other hydrocarbons, and is now actually developing and operating said lands therefor.

WHEREFORE, this defendant, having fully answered, prays:

1. That complainant take nothing by reason of his bill of complaint as amended.

2. That this defendant may have and recover of and from said complainant its costs herein expended.

3. That the complainant be decreed to have no right, title or interest in or to the oil or gas in or under the lands described in his bill of complaint as amended, or any part thereof, or any right, title or interest in or to the oil or gas produced from said land, or any part thereof, adverse to this defendant, and that the complainant has no right to prospect for, mine or remove oil or gas from said lands, or any portion thereof.

4. That if this Court should find that complainant has any interest in or to the lease above described, or in or to the oil or gas in or under the lands described in his bill of complaint as amended, or any portion thereof, or in or to the oil or gas produced from said land, or any part thereof, that such right be adjudged to be subordinate and subject to the terms and conditions of the Kettleman North Dome Unit Agreement, and the rights of the Kettleman North Dome Association to develop and operate said lands for the production of oil, gas or other hydrocarbons and the unit development and operation of the lands and leases in the North Dome of Kettleman Hills.

5. For such other and further relief as to the Court may seem meet, equitable and proper in the premises.

George W. Nilsson

Solicitor for Defendant KETTLEMAN NORTH DOME ASSOCIATION

[Duly Verified]

[Endorsed]: Filed Dec. 23, 1932 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT FRANK KENNEDY TO THE AMENDED BILL OF COMPLAINT.

The defendant Frank Kennedy, reserving his motion to dismiss, heretofore filed, and the right to renew the same hereafter, answers the amended bill of complaint of the complainant on file herein and admits, denies and alleges as follows:

I.

Answering the allegations of paragraph I of said amended bill of complaint, this defendant is without knowledge concerning the allegation that the complainant, Jean Bourdieu, is a citizen of the United States of America, and has no information or belief concerning said allegation sufficient to enable him to deny said allegation, and placing his denial on said lack of information and belief, denies that said complainant is a citizen of the United States of America; denies that this defendant, Frank Kennedy, is a resident of the City and County of San Francisco, State of California, and alleges that he is a resident of the County of San Mateo, State of California.

II.

Answering the allegations of paragraph II of the amended bill of complaint, this defendant denies that the right, title or interest, or right, title and interest of the parties to the subject matter of this suit shall be determined by the construction of the Leasing Act of February 25, 1930, 41 U. S. Stats. 437, alone, and alleges that the right, title and interest of the said parties to said subject matter is to be determined by the construction of

said Act and other laws of the United States taken together.

III.

Answering the allegations of paragraph IIa of the amended bill of complaint this defendant admits that on or about the 6th day of March, 1919, complainant made entry upon the lands referred to in said paragraph IIa; that Exhibit "A" attached to the amended bill of complaint is a true copy of the Homestead Entry; that on the 7th day of October, 1925, a patent to said lands was issued to said complainant, and that Exhibit "B" attached to the amended bill of complaint is a true copy of the patent; and in this connection this defendant avers and alleges that said entry was made as a homestead entry under the Act of February 19, 1909 (35 Stat. 639), subject to the provisions, reservations, and limitations of the Act of July 17, 1914 (38 Stat. 509), and this defendant further alleges and avers that said patent excepted from the grant therein made, and reserved to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the limitations of the Act of July 17, 1914 (38 Stat. 509).

IV.

Answering the allegations of paragraph III of said amended bill of complaint, this defendant denies that complainant is now or at any time since the 6th day of March, 1919, has been, or at any other time was, the owner of or in possession of the land described in said paragraph III; admits that during the times mentioned in said paragraph

III complainant was and is the owner and in possession of the surface and of the surface rights pertaining to said land, subject to such rights and easements therein as were reserved to the United States, and to persons claiming under the United States, as heretofore alleged.

V.

Answering the allegations of paragraph IV of said amended bill of complaint, this defendant denies that by reason of said or any ownership or by reason of anything whatsoever, or at all, complainant is now or ever was or has been at any time entitled to a preference right to a permit to prospect upon said land for oil and minerals, or oil or minerals, or in case of discovery, to a lease; or that this or any right inures to complainant by reason of the provisions of section 20 or any section of the Leasing Act of February 25, 1920, 41 U. S. Stats., 437, or by reason of any other act, or at all.

VI.

Answering the allegations of paragraph V of said amended bill of complaint, this defendant has no information or belief concerning the allegation "that complainant made a bona fide entry of said land as agricultural as provided in Section 20 of the Act last hereinabove referred to," sufficient to enable him to answer said allegation, and placing his denial on such lack of information and belief denies said allegation; denies that said land was not withdrawn or classified as mineral at the time of entry, as provided for in said section, and alleges and avers that prior to the time of said entry, said land, on or about December 30, 1910, by order of the President of the United States and pursuant to the Act of June 25, 1910

(36 Stat. 843), was withdrawn from settlement, location, sale or entry and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States. A copy of the order of withdrawal is hereto attached, marked Exhibit 1, and made a part hereof; this defendant admits that the entry has been patented to complainant with a reservation of oil and gas to the United States of America, under the provisions of that certain Act of July 17, 1914 (38 Stats. 509); denies that complainant by reason of said entry or by reason of anything else is, or was at any time, wholly qualified or qualified at all under any provision of said section 20, or of any other section or act, so as to entitle him to a preference right to a permit or to a lease in case of discovery.

VII.

Answering the allegations of paragraph VI of said amended bill of complaint, this defendant admits that on or about the 28th day of May, 1921, the defendant Thomas M. Crum procured a permit to prospect for oil and gas on a certain tract of land which included the land upon which complainant had made entry and to which he thereafter obtained a patent as thereinbefore alleged in the bill of complaint, and that said permit was formerly known as United States Oil and Gas Prospecting Permit, Visalia No. 09551, and is now known as United States Oil and Gas Prospecting Permit, Sacramento No. 019438; denies that said Crum illegally or wrongfully or with knowledge of any rights of complainant procured such permit; denies that complainant had any rights; denies that such permit was purported, or that its issuance to said Thomas M. Crum was in violation of complainant's preference rights

or any rights as landowner, or otherwise, or that complainant ever had any such preference rights, or that the issuance thereof operated as a complete denial or any denial of any rights complainant may have had to procure a United States oil and gas prospecting permit to prospect thereon, or to a lease in case of discovery; denies that personal notice to complainant ever was required by any regulations of the Department of the Interior or by the provisions of section 20, or of any section of the Leasing Act, or of any Act; and on information and belief this defendant denies that complainant had no knowledge of the issuance of said permit until the date named in the complaint, and in this connection this defendant on information and belief alleges that complainant had knowledge of the issuance of such permit at about the time of its issuance.

VIII.

Answering the allegations of paragraph VII of said amended bill of complaint, this defendant admits that subsequently, and after the issuance of the above permit to defendant Thomas M. Crum, some right, title and interest in and to this permit, insofar as it affects the lands, the surface rights of which are owned by the complainant, as heretofore alleged and admitted, was acquired by defendant Pacific Western Oil Company; denies that by reason of the possession of said permit a lease was executed by the Secretary of the Interior to Defendant Pacific Western Oil Company on or about the 4th day of October, 1929, or at any other time, and in this connection alleges that on or about said 4th day of October, 1929, by reason of the possession of said permit, a lease was executed by the Secretary of the Interior to the defendants Pacific Western Oil Company and Kettleman Oil Corporation

jointly; denies that said permit was a purported permit only, and alleges that it was a real and valid permit; denies that said lease was executed by the Secretary of the Interior under any mistake of law, or any other mistake; denies that said lease granted to defendant Pacific Western Oil Company the exclusive right to drill or explore for oils or minerals on said land, or to retain the benefits accruing therefrom; and in this connection alleges that the lease granted to the defendants Pacific Western Oil Company and Kettleman Oil Corporation the exclusive right to drill and explore for oils or minerals on said land.

IX.

Answering the allegations of paragraph VIII of said amended bill of complaint, this defendant denies that the defendant Pacific Western Oil Company is now the legal owner of said lease, and in this connection alleges that defendants Pacific Western Oil Company and Kettleman Oil Corporation are now the legal owners of said lease, and likewise the equitable owners of said lease; denies that defendant Pacific Western Oil Company and defendant Kettleman Oil Corporation, or either or both, wrongfully or otherwise, hold said lease in violation of complainant's prior or superior equitable rights, or the benefits thereunder, or of other rights or equities rightfully belonging to the plaintiff; denies that complainant has any prior or superior equitable rights, or any rights or equities whatsoever.

X.

Answering the allegations of paragraph IX of said amended bill of complaint, this defendant denies that no prospecting was ever carried on upon the land under said

permit or said lease, in regard to which complainant owns the surface rights as heretofore alleged and admitted.

XI.

Answering the allegations of paragraph X of said amended bill of complaint, this defendant denies on information and belief that the complainant learned for the first time about the issuance of said permit about the month of July, 1928, and in this connection alleges on information and belief that complainant first learned of the issuance of said permit at about the time of its issuance, and at all times had ready means of knowledge thereof; denies that said permit was merely purported. This defendant has no information or belief sufficient to enable him to answer the allegations of said paragraph X that complainant first learned during the year 1930 that the permit insofar as it affected the land in regard to which complainant owns the surface rights, had been assigned to defendant Pacific Western Oil Company, and placing his denial on said lack of information and belief denies all of said allegation.

XII.

Answering the allegations of paragraph XI of said amended bill of complaint, this defendant denies all of said allegations.

XIII.

Answering the allegations of paragraph XIV of said amended bill of complaint, this defendant denies that by reason of the matters or things alleged in said amended bill of complaint, or by reason of anything else, the defendant Pacific Western Oil Company or any other defendant, or any one, now holds title to said lease in trust for the complainant.

XIV.

Answering the allegations of paragraph XV of said amended bill of complaint, this defendant denies that defendants Thomas M. Crum, C. G. Smith, Olen Lane, M. H. Goode, Roy E. Collom, or the fictitious defendants, or any of them, have any interest in and to the premises therein referred to or in or to the oil and gas lease covering the same, insofar as it affects said premises, or otherwise; denies on information and belief that defendant Frank*lin* R. Kenn*ey* has or claims any interest in or to said premises or in or to the oil and gas lease covering the same, in any respect; admits that he, defendant Frank Kennedy, and the defendant Kettleman Oil Corporation and defendant Kettleman North Dome Association have and claim some interest in and to the premises above described, and in and to the oil and gas lease covering the same, insofar as it affects said premises, adversely to complainant, but denies that each and all, or each or all, or any of the claims of himself, the defendant Frank Kennedy, or of defendants Kettleman Oil Corporation or Kettleman North Dome Association, is or at any time has been, without any right, or that each and all, or any, of said claims of any of the defendants named in the amended bill of complaint, or this paragraph, is subject to or is subservient to the rights of the complainant hereunder, and in this connection this defendant Frank Kennedy alleges that he was the immediate assignee of and acquired said permit from said Thomas M. Crum prior to the issuance of the lease as aforesaid, and that he was the assignor from whom mediately or immediately the defendants Pacific Western Oil Company and Kettleman Oil Corporation, and such other of the defendants as have any

right or interest in or to said permit and lease, derived their rights and interest in or to said permit and lease, and that he has a royalty interest in and to said lease.

XV.

This defendant alleges that complainant is entitled to no relief whatsoever or any part of the relief demanded in said amended bill of complaint, and that complainant has no standing in this court, or in any court of equity.

XVI.

This defendant further alleges that the alleged cause of action set out in said bill of complaint arose and accrued more than five years next prior to the commencement of this suit, and did not accrue within five years next prior thereto.

AND AS A FURTHER AND SEPARATE DEFENSE to said amended bill of complaint, this defendant alleges that complainant has neglected to avail himself of any rights which he might have had in the land referred to in the amended bill of complaint or in said permit or in said lease for an undue and unreasonable length of time during which time the defendants have unalterably changed their position; and that complainant has been guilty of such delay, acquiescence and laches as to bar him from the relief prayed for by the amended bill of complaint or from any relief in equity.

AND AS A SEPARATE AND FURTHER DEFENSE to said amended bill of complaint this defendant alleges that the United States of America and the proper executive officers thereof are indispensable parties to a complete determination of this suit and of the claim of complainant, and that there is a defect of parties to this

suit in that neither the United States of America nor such officers as are either parties plaintiff or parties defendant hereto.

WHEREFORE, this defendant Frank Kennedy prays that complainant take nothing by his bill of complaint and amended bill of complaint, and that this defendant recover his costs of suit herein incurred.

Frank Kennedy
Defendant

BROBECK, PHLEGER & HARRISON
Attorneys for defendant Frank Kennedy.

STATE OF CALIFORNIA)
) ss
City and County of San Francisco)

FRANK KENNEDY, being duly sworn, deposes and says:

That he is the defendant named in the foregoing Answer; that he has read said Answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

Frank Kennedy

Subscribed and sworn to before me this 19th day of December, 1932.

[Seal] Eugene P. Jones
Notary Public in and for the City and County of San Francisco, State of California

EXHIBIT 1.

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
Washington

Office of the Director

December 28, 1910

The Honorable,
The Secretary of the Interior.

Sir:

Information received from the field indicates that the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action:

Very respectfully,

(signed) H. C. Rizer
Acting Director

December 29, 1910.
Respectfully referred to the President with favorable recommendation. ECF
(signed) Frank Burns
Acting Secretary.

SPECIAL

December 30, 1910.

ORDER OF WITHDRAWAL

Petroleum Reserve No. 16—California No. 7.

It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910:

Oil—California No. 7, p. 2.

Mt. Diablo Meridian, California.

T. 20 S., R. 16 E., Sec. 25, SW¼;
Sec. 26, all;
Sec. 34, E½;
Sec. 35, all;
Sec. 36, all.

T. 21 S., R. 16 E., Sec. 1, all;
Sec. 2, all;
Sec. 3, S½;
Sec. 4, N½ of NW¼, SE¼ of NW¼, NE¼ of SW¼, SE¼;

Sec. 9, N½ of NE¼, SE¼ of NE¼, NE¼ of SE¼;

Sec. 10, all;

Sec. 11, all;

Sec. 12, all;

Sec. 13, all;

Sec. 14, all;

Sec. 15, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

Sec. 23, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

Sec. 24, all;

Sec. 25, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

T. 20 S., R. 17 E., Sec. 31, SW¼.

T. 21 S., R. 17 E., Sec. 6, all;

Sec. 7, all;

Sec. 8, all;

Sec. 16, W½ of NW¼, SW¼;

Sec. 17, all;

Sec. 18, all;

Sec. 19, all;

Sec. 20, all;

Sec. 21, W½ of NE¼, W½, W½ of SE¼, SE¼ of SE¼;

Sec. 26, SW¼ of SW¼;

Sec. 27, W½ of NW¼, SE¼ of NW¼, S½;
Sec. 28, all;
Sec. 29, all;
Sec. 30, all;
Sec. 31, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼;
Sec. 32, N½, N½ of SW¼, SE¼.
T. 22 S., R. 17 E., Sec. 4, NW¼, E½ of SW¼.

Oil—California No. 7, p. 3.

The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres.

(signed) Wm. H. Taft.
President.

Dec 31 1910
Referred to the Commissioner ECF
of the General Land Office
for appropriate action.
(signed) R. A. Ballinger
Secretary.

[Endorsed]: Filed Dec. 20, 1932. R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT FRANKLIN R. KENNEY.

FRANKLIN R. KENNEY, one of the defendants above-named, in answer to plaintiff's Bill of Complaint on file herein, as amended, admits, denies and alleges as follows:

I.

Alleges that he is without knowledge as to the allegation contained in Paragraph I of said bill of complaint as amended that complainant is and at the time of the filing of the Bill of Complaint herein as amended was a citizen of the United States of America and a resident of the County of Fresno, State of California in the Southern District of California, Northern Division, and basing his denial upon that ground said defendant denies that complainant is or at the time of the filing of the Bill of Complaint herein as amended was a citizen of the United States of America or a resident of said County of Fresno or of the Southern District of California, Northern Division, and further denies that complainant was at any time mentioned in said Bill of Complaint as amended, ever has been or now is a citizen of the United States of America. Said defendant admits that he is and at the time of the filing of the Bill of Complaint herein as amended was a citizen of the United States of America, but denies that he is or at any of said times was a resident of the City and County of San Francisco, State of California: and in this behalf said defendant alleges that he is and at all times herein mentioned was a resident of the County of Monterey, State of California. Said de-

fendant further alleges that he is without knowledge as to the allegations set forth in that portion of Paragraph I of said Bill of Complaint as amended commencing with the words "That the defendant, Pacific Western", page 1, line 26, to and including the words "State of California", page 2, line 14 and that portion of said paragraph commencing with the words "That the defendant, Olen Lane", page 2, line 18, to and including the words "State of California", page 2, line 26, and basing his denial thereof on that ground, denies generally and specifically each and every allegation set forth in said portions of said paragraph.

II.

In answer to the allegations set forth in paragraphs II-a, VII, VIII and X of said Bill of Complaint as amended, said defendant alleges that he has no knowledge or belief sufficient to permit him to answer any of the allegations set forth in said paragraphs, and basing his denial thereof on that ground, denies generally and specifically each and every allegation set forth in said paragraphs.

III.

In answer to the allegations set forth in Paragraph III of said Bill of Complaint as amended, said defendant denies that the complainant is now or at any time since the 6th day of March, 1919, or at any other time has been, or ever was, the owner or in possession of the parcel of land described in paragraph III of said Bill of Complaint as amended, or any part thereof.

IV.

In answer to the allegations set forth in Paragraph IV of said Bill of Complaint as amended, said defendant

denies that by reason of said or any claimed ownership or otherwise, complainant is now and/or has been at all or any time since February 25, 1930, entitled to a preference or any right to a permit to prospect upon said land or any part thereof for oil and/or minerals and /or in case of discovery thereof to a lease; or that said alleged right or any right inures to complainant by reason of the provisions of Section 20 or any other section of the Leasing Act of February 25, 1920, 41 U. S. Stats. 437, or by reason of any act or statute, or at all.

V.

In answer to the allegations set forth in Paragraph V of said Bill of Complaint as amended, said defendant is without knowledge as to the allegations set forth in that portion of Paragraph V of said Bill of Complaint as amended commencing with the words "That complainant made", page 4, line 4, to and including the words "referred to" on page 4, line 6, and basing his denial thereof on that ground, denies generally and specifically each and every allegation set forth in said portions of said paragraph. Said defendant denies that said land was not withdrawn or classified as mineral at the time of said alleged entry, as provided in said Section 20, and alleges that prior to the time of said alleged entry said land on or about December 30, 1910, by order of the President of the United States and pursuant to the Act of June 25, 1910 (36 Stats. 847; 43 U. S. C. A. Secs. 141, 142 and 143) was withdrawn from settlement, location, sale or entry and

reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States. Said defendant denies that said complainant is or at any time was qualified under any provisions of said Section 20 or any other section of said Act or under any other act or statute, or at all, so as to entitle him to a preference or any right to a permit or to a lease or any other right in case of discovery.

VI.

In answer to the allegations set forth in Paragraph VI of said Bill of Complaint as amended, said defendant alleges that on or about the 28th day of May, 1921, the defendant Thomas M. Crum procured a permit to prospect for oil and gas on a certain tract of land which included the complainant's land; that said permit was formerly known as United States Oil and Gas Prospecting Permit Visalia No. 09551 and is now known as United States Oil and Gas Prospecting Permit Sacramento No. 019438. Said defendant denies that said Thomas M. Crum procured such permit to prospect for oil or gas on said land illegally or wrongfully or with knowledge of said alleged rights of complainant, or any rights of complainant, or that such permit was purported, or that its issuance was in violation of complainant's preference right or any right as land owner or otherwise, or that complainant has or ever had any preference or other right to procure a United States Oil and gas prospecting or other permit and/or a lease in case of discovery, or that any personal notice

was required by the regulations of the Department of the Interior or the provisions of Section 20 of the Leasing Act or of any other section or of any other act or statute or at all, or that no notice was given to complainant of said Thomas M. Crum's intention to apply for a prospecting permit to explore for oil and minerals on said lands. Said defendant further denies that complainant had no knowledge of the issuance of said permit to said Thomas M. Crum until the date named in said Bill of Complaint as amended, and in this connection said defendant alleges that complainant had knowledge of the issuance of said permit at or about the time of its issuance, the 28th day of May, 1921, and at all times thereafter.

VII.

In answer to the allegations set forth in Paragraph IX of said Bill of Complaint as amended, said defendant denies that no prospecting or drilling has been, or is now being, carried on upon the land covered by said permit and said lease.

VIII.

In answer to the allegations set forth in Paragraph XI of said Bill of Complaint as amended, said defendant denies that complainant has any rights entitling him to seek relief in a court of equity or of law.

IX.

In answer to the allegations set forth in Paragraph XIV of said Bill of Complaint as amended, said defendant denies that by reason of the matters and things alleged

in said Bill of Complaint as amended, or at all, the defendant Pacific Western Oil Company now holds title to said or any lease or any portion thereof in trust for complainant.

X.

In answer to the allegations set forth in Paragraph XV defendant denies that the defendants other than defendants Frank Kennedy, Pacific Western Oil Company, Kettleman Oil Corporation and Kettleman North Dome Association have any interest in or to the premises described in said Bill of Complaint as amended, or any part thereof, or in or to the oil and gas lease covering the same, in so far as it affects said premises, adversely or otherwise to complainant,and denies that each or all of the claims of said defendants Frank Kennedy, Pacific Western Oil Company, Kettleman Oil Corporation and Kettleman North Dome Association is or at all or any of said times has been without any right, or that each or all or any of said claims is subject or subservient to any rights of complainant and denies that said complainant has any rights in and to said premises.

Further answering said Bill of Complaint, as amended, and for a further and separate defense to this suit defendant alleges that neither complainant nor his ancestor, predecessor or grantor was seized or possessed of the property referred to in said Bill of Complaint, as amended, or any part thereof, within five years before the com-

mencement of this suit, or otherwise, or at all, and that said suit is and at the time of the commencement thereof was barred by the provisions of Section 318 of the Code of Civil Procedure of the State of California.

Further answering said Bill of Complaint, as amended, and for a further and separate defense to this suit, this defendant alleges that for upwards of eleven years next prior to the filing of said Bill of Complaint, as amended, defendants Frank Kennedy, Kettleman Oil Corporation, Kettleman North Dome Association and Pacific Western Oil Company and their predecessors in interest have been in possession of the premises described in said Bill of Complaint as amended, and that such possession is and at all of said times has been actual, open, adverse, notorious, hostile, continuous, uninterrupted and exclusive and that complainant's alleged cause of action is and at the time of the commencement thereof was barred by the provisions of Sections 322, 323, 324 and 325 of the Code of Civil Procedure of the State of California.

Further answering said Bill of Complaint, as amended, and for a further and separate defense to this suit, this defendant alleges that complainant's alleged cause of action is and at the time of the commencement thereof was barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

Further answering said Bill of Complaint, as amended, and for a further and separate defense to said suit, this defendant alleges that on or about the time of the issuance of said oil and gas prosepcting permit to said Thomas M. Crum, to wit, on or about the 28th day of May, 1921, the complainant knew of the issuance of said oil and gas prospecting permit; that the complainant never asserted any objection to the issuance of said permit or to the execution of said lease and never asserted any claims or equities in or to said permit or lease until the filing of the bill of complaint herein as amended on the 1st day of July, 1931; that complainant has thus neglected to avail himself of any rights which he might have had in the land referred to in the Bill of Complaint, as amended, or in said permit or in said lease, for an undue and unreasonable length of time, during which time the defendants have unalterably changed their position, and that complainant has been guilty of such delay, acquiescence and laches as to bar him from the relief prayed for by the Bill of Complaint, as amended, and for any relief in equity.

WHEREFORE, said defendant prays that complainant take nothing by his Bill of Complaint, as amended, and that said defendant recover his costs of suit herein incurred.

R. W. Palmer.
Attorney for said Defendant.

ORRICK, PALMER & DAHLQUIST
Of Counsel.

STATE OF CALIFORNIA,)
) SS.
City and County of San Francisco.)

R. W. PALMER, being first duly sworn, deposes and says:

That he is a member of the firm of Orrick, Palmer & Dahlquist, and the attorney for Franklin R. Kenney, one of the defendants in the above-entitled action; that affiant makes this verification for the reason that said defendant resides out of the City and County of San Francisco, State of California, in which said City and County affiant has his office and is absent therefrom; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

R. W. Palmer

Subscribed and sworn to before me this 19th day of December, 1932.

[Seal] Hallie L. Lanfar
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 21, 1932. R. S. Zimmerman, Clerk By Edmund L Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CONDENSED STATEMENT OF EVIDENCE

Be it remembered that on the 19th day of October, 1933, this cause coming on for hearing at Los Angeles, California, before Paul J. McCormick, District Judge, the plaintiff being present in person and by Howard W. Wright of the firm of Chandler, Wright & Ward of Los Angeles, California, and A. B. Dorman of Los Angeles, California; and the defendants being present by Herbert Clark of the firm of Morrison, Hohfeld, Forster, Shuman & Clark of San Francisco, California, and by Herman Phleger of the firm of Brobeck, Phleger & Harrison of San Francisco, California, and by Felix T. Smith of the firm of Philsbury, Madison & Sutro of San Francisco, California, and by George W. Nilsson of Los Angeles, California.

Thereupon both sides announcing that they were ready, the trial proceeded as follows:

The opening statement was made by Mr. Dorman on behalf of Complainant, and by Mr. Clark on behalf of Defendants.

It was stipulated that any objections made or other actions taken by attorneys for the other defendants should be considered as having been made or taken also by George W. Nilsson, attorney for defendant Kettleman North Dome Association, on behalf of said defendant.

JEAN BOURDIEU

was called as a witness on behalf of the complainant and was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT

I am the complainant in this action and live in Kettleman Hills. My occupation is that of a sheep raiser. I was born in the Basque, Pyrenees, France, in 1887 in a farming community. My father was engaged in farming and sheep raising, and I went to work on my father's farm.

In 1904 I came to the United States settling in Monterey County, California, where I engaged in the sheep business. In the year 1914 I took my sheep to the Kettleman Hills from Monterey County and acquired a so-called sheep range in Township 21, Range 17. I am still running sheep on that same range. I had most of the sections in the township in this sheep range. My brother has been associated with me in the sheep business since 1915 and is at present. I lease these lands in the sheep range and pay rental to different owners.

About the year 1917 I first learned that the lands involved in this action, being the north half of Section 30, were owned by the government. Mr. Stump of Coalinga, who is a surveyor, informed me. I was not leasing land from him at that time. In the year 1919 I filed a homestead application on this land after hearing that it was open for entry. In the summer of 1919 I established my residence on the land and continued to reside there. I built some roads to my ranch, built a home and outbuild-

(Testimony of Jean Bourdieu)

ings and corrals for my sheep. I farmed some of the land, raising sheep feed. After that time I used this land and my home as headquarters for the sheep business. In the winter season sheep don't need no water, but I used to haul the water from my brother's ranch for part of the sheep. I hauled the water from the City of Coalinga for domestic use.

(Complainant's Exhibit 1, being a photostatic certified copy of Homestead Entry, Visalia, Serial No. 08309, was offered and received in evidence without objection.)

The date of application of homestead entry shows as March 6, 1919. At that time I was engaged in the business of raising sheep. At the time that I made entry I made affidavit regarding the non-mineral character of the land. Immediately thereafter I established my residence on the land. At the time of my entry I was familiar with the Kettleman Hills area which was part of my sheep range. I had never seen any indications of oil on this land. I knew nothing about the oil business nor about oil wells. I never saw any seepage of oil anywhere around that district. My purpose in making the entry was to acquire a patent for agricultural purposes.

A well was drilling in Kettleman Hills on lands adjacent to mine in the fall of 1924, north of my land. This was drilled on Section 20 and was abandoned. So far as I know, after 1924 the next drilling was in the fall of 1928, a little more than three miles from my land. I couldn't see the derrick from my land. In the fall of 1928 oil was first discovered in Kettleman Hills.

I first heard that Mr. Crum had obtained a permit on my land in the fall of 1928. I misunderstood your

(Testimony of Jean Bourdieu)

question a minute ago. I was not notified by Mr. Crum that my land was embraced in an oil permit issued to him in 1921. I was not notified by Mr. Crum or anyone on his behalf in writing or otherwise. Mr. Bottler, an attorney of Coalinga, informed me that my land was included in this permit.

Before the date of my entry on the land March 6, 1919, no prospecting for oil had been made on my land.

Neither Mr. Crum or anyone else in his behalf or otherwise served personal or any notice on me of an application for an oil and gas prospecting permit covering the lands involved in this action, with a warning therein that if I desired to exercise my preference rights in the permit I must file within 30 days thereafter my application therefor, or containing any other warning.

At the time I received my patent no prospecting had been carried on on my lands in Section 30.

(Complainant's Exhibit No. 2, being U. S. Patent issued to Mr. Bourdieu, was offered and received in evidence without objection.)

At the time I filed this action on July 1st, 1931 no prospecting for oil or anything else had been done on any of my land. Since that date, in the spring of 1933, a well was commenced and I think it has been placed on production. The well was drilled by Kettleman North Dome Association. I first learned in the fall of 1930 of the lease now covering these lands and that is stated in my complaint. I read it in the Coalinga paper. I have never been paid any sum of any kind for damages by any of the defendants in this action for going on my property. Nor have I made any agreement with any of the defend-

(Testimony of Jean Bourdieu)

ants for the payment of any damages for their going on my property. No suit has been filed against me to adjudicate the amount of damages that my lands have sustained by reason of the entry by these defendants.

(Complainant's Exhibit No. 3 consisting of a certificate of the County Clerk of Fresno County to the effect that no action had been brought by any of the defendants against complainant or that any such action was pending in Fresno County, was offered and received in evidence.)

I became a citizen of the United States in the year 1919.

(Certificate of Naturalization No. 96030 dated March 29th, 1919 in the name of Jean Bourdieu of Coalinga, Box 815, was read in evidence. It was issued by D. M. Barnwell, County Clerk of Fresno County, by George W. Huffman, Deputy.)

I am the Jean Bourdieu named in the certificate which was just read to the Court.

CROSS EXAMINATION
BY MR. CLARK

(Mr. Clark, counsel for defendants, introduced a sectional map purporting to give the sections and cross-sections of Kettleman Hills, and the same was received in evidence without objection, and hereafter marked defendants' Exhibit B.)

In the winter of 1914 and 1915 I first went into the country around Kettleman Hills and first went on Section 30 which is represented on the map here introduced by the lemon colored section. From 1914 on we were the tenants of all this land surrounding Section 30. I don't say that

we had 36 sections. I said a part of the township. We rented some land from the railway company, but I don't know exactly how many sections; we rented also from others. We did not rent any in this vicinity other than from the Southern Pacific Company. We did not rent lands in the hills from anybody other than the Southern Pacific Company. The Southern Pacific lands in Section 29 were rented from the Southern Pacific Company. In the year 1914 and 1915 this land was sub-leased to us from another man, that is he transferred the lease to us. From 1914 up to about 1920 I was living at the Pulvodero Ranch on Section 1-21-16, that is the section above on the map and was owned by Mr. Estram. For a while I lived with my brother on Section 1-21-16, the south half of the section. He has a homestead entry on the south half.

I stated in direct examination that I was familiar with the area in the Kettleman Hills territory and grazed sheep there. I had been over that area many times. I did not keep the sheep there all the time as I used to take them to other places in the summer and spring. I kept them there when the grass was good in the fall. I grazed sheep on Section 30, on Section 20 Township 21, Range 17 East and on Section 29. In 1920 I leased part of Section 29 from Huffman. I didn't do any surveying in that part of the country except that I surveyed in Section 30 in the year 1919 or 1917 at the time I made entry on my land.

Referring to the entry application, being complainant's Exhibit No. 1, I remember signing the original and reading it. It is an affidavit and I read it very carefully. I remember that it was made "subject to provisions and

(Testimony of Jean Bourdieu)

reservations and limitations of the Act of July 17, 1914", in my affidavit.

The first time I went to Section 30 was in 1915 which I recall. We ran the sheep on the surrounding lands. At that time in 1915 I was living on Section 1. At that time there were no roads other than what is called in that country a wagon trail. My brother's house was situated on the south half of Section 1-21-16 toward the middle of the south half. It was near the corner of the northeast quarter. The house was approximately where you have marked "X" on the map. In those days (1915) we didn't establish a camp on Section 30, so we never had to go with a wagon to that section. In going from Section 1 to Section 30 we walked. Sometimes we walked by Section 18 and 19 by way of Section 12. We went through Sections 18, 19 and 30. We would also go by way of Section 20-21-17 and Section 18. Beginning at the house of Ed Bourdieu in Section 1 we went to Section 30 by way of Section 20 through Sections 18, 17, 20 and 29. There were gulches between Section 30 and Section 29. There was a kind of a road there in Section 30 as it didn't go to Section 30. There are no roads going along from No. 1 through Sections 12, 18, 19 and 30. There is not a paved road but just a wagon trail. In 1915 there was no road. We never went with a wagon to Section 30; that was after. There was not a wagon trail in 1919 from Section 1 through Sections 12, 18 and 19 to Section 30. I built a road on Section 18 to go to 30. This road was built through 19 and a rolling hill on 18 and a gulch from Section 19 to go to my homestead. I know that I built a road on Section 19, the east half of the section. There were two gulches over west of

(Testimony of Jean Bourdieu)

the road, one on either side. I think that I built the road on half of Section 19 and I marked it on the map. I didn't build it to Section 30, I didn't need it because this land was no gulch and I don't need no road. I built this road in 1919 in the summer. I didn't build any other road or wagon trails to get to Section 30. I built a road in Section 30 in the north half of the section. I think it was in the northeast quarter, and I will draw a line marking it on the map. It was above the house and west of the house. I built the house in the summer of 1919. The house faced the east and was about 200 yards south of the North Section line. It had a front porch. I was often at home.

MR. WRIGHT: If the Court please, I would like to object to those questions as being incompetent, irrelevant and immaterial. I don't see the purpose or what good can be served by this line of examination. There is no attack, direct attack, in this action on the patent. If he is trying to prove that he didn't stay there and serve his proper time or didn't build his home on his own land, that is not an issue in this case, your Honor. The allegations of the answer are to the effect that he was granted a patent under the 1914 law.

THE COURT: Overruled. (Objection noted and motion made to strike.)

(WTNESS RESUMES:) There were at least two ways in 1919 to get to Section 30 from Section 1.

QUESTION: I mean by that wagon trails existed, didn't they?

MR. WRIGHT: If the Court please, we would like to make the same objection as to his methods of going there on the ground it is improper cross-examination. I think

(Testimony of Jean Bourdieu)

these trips and different routes from Section 1 to Section 30 are utterly immaterial and improper cross-examination.

THE COURT: Overruled. (Exception noted and motion made to strike.)

(WITNESS RESUMES): There weren't any roads except a wagon trail. Until I made a wagon trail in 1919 there was no way to get to Section 30 except horseback. In a wagon it was possible to go around Sections 32 and 31. There was a farther way to go, but this was the nearest way. Sometimes in going to the sheep camps I went by Section 32 in 21-17 part of the time and sometimes by Section 19. I took Mr. Huffman in there by Section 20. I met him in Section 1-21-16. I will mark on the map the road I followed with Mr. Huffman. I will mark it "road taken by Huffman." I rode in his automobile and showed him the way.

QUESTION: What part of 29 did you go to?

MR. WRIGHT: If the Court please, I object to this as improper cross-examination. What he did with Mr. Huffman is not an issue here at all. This, as I understand it, occurred back in 1920 and it is utterly immaterial to this action.

THE COURT: Overruled. (Exception noted and motion made to strike.)

(WITNESS RESUMES:) On direct examination I mentioned that a well was started in the fall of 1924. I think it was in late summer or fall of 1924 there was a drilling rig at the site. It was a matter of some interest to me to see it and I went sometimes to the site. From my house I could see this rig. I know the man that drilled the well, Mr. Neil. The well was in the southwest

quarter about three-quarters of a mile from my house. I could see it easily from my porch. The photograph which you show me is a picture of the rig. It was a small rig, maybe 55 feet, possibly 65 feet.

(Defendant's Exhibit A, consisting of several photographs of an oil rig, was offered and received in evidence without objection.) These four photographs are contained in the separate book of Exhibits and are hereby referred to and incorporated herein.

WITNESS RESUMES: This well in the Southwest corner of Section 20, was abandoned. The next drilling after this which took place in any of this area in the same township where I grazed sheep was in the winter of 1928 on Section 28-21-17. I don't know who drilled the well. I didn't go to the well, but I went in the surrounding country as my lease from the Standard Oil Company covered the surrounding country. This well began to drill some time in the year 1928 or in the spring of 1929. I had leased the land in Sections 21 and 29 from the Standard Oil Company and I went over on to Section 28. I didn't lease Section 28. I was at the well site on 28 during the time the well was drilling. The next well after the one in Section 28 I think was in Section 34-21-17 East which began drilling about the same time. I think in the fall of 1928. I don't know who drilled that well. I was around there in the spring and winter of the year. I used to rent Section 33 from the Standard Oil Company. I was on the site on Section 28 many times. After the well on Section 34 I think there was no more drilling for a couple of years. I was on Section 26-21-17. A well was drilled on that section in 1927,

(Testimony of Jean Bourdieu)

but that is outside of Kettleman Hills. It is outside of the area represented by the red line. I was over at that well many times while it was drilling. I think the wells on Section 28 and 34 were brought into production in the year 1932, or possibly in 1931. Drilling was begun on a well in 1929 or 1930 on Section 29, and later came into production. This well I could see from my house. It is in the northeast quarter of Section 29. There was another one on Section 29 drilled by the Standard Oil Company some time in 1929 or 1930. Another one on Section 29 was begun in 1930 or 1931. There were no wells drilled in 1927 in Kettleman Hills but there were in this section. There were wells put down in Kettleman Hills in 1928 and 1929. I saw them drilling the wells on Sections 29 and 28 and 34. I saw them drilling on the sections mentioned several times each week in 1927. The well begun in 1927 was abandoned. In 1928 I saw the drilling going on four or five times a week in the spring. In the year 1929 I frequently saw the drilling taking place on Section 29 throughout the year three or four times a week during the whole year. I also saw the drilling on Section 34 nearly every day that I was in that vicinity. Most of my time was spent in that part of the country. In the years 1927, 1928 and 1929 most of my time was spent in that area. I was familiar with the activity day by day during those years.

I began to use the wagon trail in 1915 running through Sections 12, 18 and 19. The road running through Sections 6, 7, 18, 17 and 20 we have marked as the road taken by Huffman. The ravine through the northeast corner of Section 30 and the southwest corner of Section 20 runs from south to north approximately. That

(Testimony of Jean Bourdieu)

ravine is in the corner of Sections 30 and 29. The ravine ran along the section line between Sections 20 and 19 approximately. I don't cross the ravine into Section 29 in taking Mr. Huffman as I get into my place through Section 19. I always went by way of Section 19 and then by Section 32. I am familiar with the land in Section 30 and east of it and was familiar with the area in the northeast corner of Section 30 as my house was situated there. Also I was familiar with the southwest corner of Section 20, both in Township 21, So. Range 17 East. I stated this morning that I learned from Mr. Bottler, a lawyer in Coalinga, that a permit had been issued to Crum covering Section 30. The lawyer's first name is Eugene. It was late in the summer of 1928 that I learned this, in the month of July. Mr. Bottler told me of the existence of the Crum permit. He wrote to the Land Office at my request. I wanted to get the information from the Land Office about the Crum permit as I wanted to find out if he had one. Mr. Bottler was to find out for me. I wanted to find whether there was a permit so asked him to go and find out. I told him to find out about the land before he told me about the permit.

In traveling between Section 20 and Section 30 to my home I didn't see a stake in the northeast quarter of Section 30 and the southwest quarter of Section 20. I didn't see a similar stake in the northwest quarter of Section 20 marking the quarter corner between 20 and 30. In the corner of Section 18 was a post, but I couldn't see nothing any place else at any time. I don't know whether it was there as early as 1921 but I saw the post. I also saw the post in the center of Section 18 about 5 feet tall, but that was later than 1921. I saw a post in the

(Testimony of Jean Bourdieu)

northeast corner of Section 19 about 5 feet tall. There was a post on Section 19 on the southeast corner in the ravine we have been talking about near the road which I saw every time I went along the wagon trail. I also saw one on the southeast corner outside in 1923, a replaced post 4 feet tall. I didn't know that Mr. Evans put that post there. I know Mr. Evans. I also have known Mr. Crum since 1915 and Mr. Sumpf.

Mr. Kennedy told me that Crum had a prospecting permit to drill for oil covering Section 30 and other land. I wanted the information about a permit as I was told several years before that I had a preferential right. I don't remember who it was told me that. It was several years before 1928, not less than three years before. I did not want that information as early as 1924. I saw Mr. Neil drilling. I never asked no information who was drilling the well. I thought it was the owner of the land. It was before 1928 someone told me that I had a preference right. I understood that I had a preference right for the permit for the mineral for the drilling of oil. That was of no importance to me and it made no impression on my mind. He said "you have a preference permit or a preference right from the government of the United States to drill for oil under the north half of Section 30." That was several years before 1928, but that made no impression on me. It was not before 1928 that I made inquiry whether or not a permit to drill covered my lands. I just stood still after learning that I had a preference right and didn't do anything. I was not interested in the minerals. If any one filed a permit I would have been notified. I didn't file an application with

(Testimony of Jean Bourdieu)

the government for the right to drill for oil and have not done so, nor for a lease. In July, 1928 when Mr. Bottler told me that the Crum permit to drill covered the north half of Section 30 I didn't do anything and nothing in 1929 or in 1930. During all that time I knew that wells were being drilled in Sections 29, 28, 34 and 26. I never had an opportunity to do anything before. I went to see Mr. Dorman in 1931. I was introduced to Mr. Dorman in 1930 by an attorney named Biagi at San Jose. Mr. Biagi is the attorney for my brother and Mrs. Bourdieu. I was introduced to Mr. Dorman in the fall of 1930. I told him about my property, that I was the owner of this half section, and he said he would find out if he could help me. That was the first time after July, 1928 that I did anything. I didn't have an opportunity to meet anyone before to take my case. Mr. Bottler is an attorney and also the gentleman from San Jose. The fact that I was entitled to the oil rights under the 322 acres was a matter of importance to me. The reason for having done nothing from July, 1928 to the fall of 1930 is because I had no opportunity to have someone take my case. I don't mean that no lawyer happened to pass that way. I saw another attorney than Mr. Dorman named Carl Kennedy who lives in Coalinga in 1929 or 1930. I did nothing after seeing Mr. Kennedy. I didn't ask Mr. Bottler why he did not proceed to make my claim, nor Mr. Kennedy as to why he didn't proceed. I did nothing in the way of claiming a preference right until I met Mr. Dorman. Mr. Kennedy was not able to take care of my case on account of the finances, both his own finances and mine.

(Testimony of Jean Bourdieu)

QUESTION: After you saw Mr. Kennedy why was it that he didn't proceed?

MR. WRIGHT: If the court please, I would like to object to that question as improper cross-examination and immaterial and asking for information which the witness doesn't possess and asking for a conclusion of the witness. Why some lawyer didn't proceed is utterly immaterial.

. . . . .

MR. WRIGHT (Again): If the court please, in answer to that I would like to again state our position here. The affirmative defense of laches is not available to these defendants for two reasons, the first one is that he could not be guilty of laches until he has received a notice which he is entitled under the law to receive prior to waiving any rights. The second is that under the 1914 homestead law a bond must be filed with the court in which action must be brought to fix and determine the damages which the patentee sustains by virtue of any entry made on those lands. And I would like to quote to your Honor some language from the United States Supreme Court on that subject.

THE COURT: Objection overruled. (Exception noted and motion made to strike.)

(WITNESS RESUMES:) Mr. Kennedy was not able to take care of my case on account of the finances, both his own finances and mine. I didn't go forward because I couldn't pay to do so. I went forward in 1930 because my attorneys, Mr. Dorman, Mr. Chandler and Mr. Wright financed themselves. I haven't put up the expenses of the suit. I pay my own expenses in coming here. I have not paid Mr. Dorman's expenses in going to Kettleman

(Testimony of Jean Bourdieu)

Hills nor his expenses in going to Washington. My attorneys will receive 50% from the case. I knew that Mr. Neil was drilling on Section 20 in 1924 and that Mr. ter Haar had a homestead entry on that land. His entry was on the northeast part. Mr. ter Haar also owns the southwest quarter of Section 20. I have known Mr. ter Haar a long time and was one of his witnesses in his homestead application. I also know Mr. Hans Sumpf as he was one of my witnesses for application for homestead. I didn't read the affidavit he filed in support of my application. He didn't tell me that in his opinion there were any indications of oil value in that land. I didn't read the affidavit he filed with the Land Office. That is Mr. Sumpf's signature.

I didn't read the affidavit filed by Mr. Sumpf in support of my homestead application. I went to Visalia in Mr. Sumpf's automobile. I have no recollection of what we talked about. Mr. Sumpf had not told me of any of the contents of the affidavit which he filed or that he stated in it that there was a possibility of oil being found on the land. I didn't think at the time of entry that there was a possibility of oil being found, and had no thought of that.

I don't remember who told me in 1925 about my preference right, but I have a distinct recollection I was told that several years before 1928.

I read about the lease in the Coalinga paper which covered Section 30. The paper is the Daily Record of Coalinga. I didn't subscribe regularly for the paper from December, 1926 and was not a subscriber in 1926 and 1927. I subscribed for it in 1929. I think the first year of my subscription was 1930 as a subscriber. It

(Testimony of Jean Bourdieu)

was sent to my post office address in Coalinga, Box 305. In 1927 the box was No. 815. I bought a copy of the paper in 1927 and 1928 each time I would go into town. In 1930 I saw in the Coalinga Daily Record a statement that the lease had been issued covering Section 30 and other lands. I saw this statement in the paper in January, 1930. When I saw this statement I got my claim in the hands of Mr. Carl Kennedy. I have told you everything that Mr. Bottler told me when he told me that a permit had been issued. Mr. Bottler said that a permit covering the north half of Section 30 was issued to Mr. Kennedy. I never met Mr. Kennedy and I have never seen him, that is Mr. Frank Kennedy, one of the defendants in this case. Mr. Bottler didn't tell me that the permit covered other lands.

I remember when the so-called Elliott well in Section 2 came in in the fall of 1928 in the month of October. I was not interested in the fact and did nothing toward claiming a preference right. In 1930 I saw Mr. Kennedy, the attorney. I don't remember what Mr. Kennedy said to me. Mr. Bottler's address is Coaling and Mr. Kennedy's also. They live there now. I know the well that is called the Milham Kennedy No. 1 in Section 28, Township 21 S. Range 17 East. I think it is in the southwest part of the section. I saw that well in the fall of 1928. It was completed in June, 1931. I saw that well drilling regularly until it was completed. If it began drilling in 1928, I saw it them. I know of the Kettleman North Dome Association. These lands were transferred to the North Dome Association in 1930 or 1931.

(Testimony of Jean Bourdieu)

FURTHER CROSS EXAMINATION
BY MR. PHLEGER

I read in the paper that other lands than Section 30 was included in the permit. It might have been before I talked with Mr. Kennedy. I don't remember that Mr. Kennedy told me that the permit covered other sections of land. I was only interested in Section 30. I learned that the land was in the hands of the Kettleman North Dome Association. In July 1931 I made a demand upon the defendants in filing the complaint. Before that time I made no demand nor had I given any notice of a claimed right. I have never made application to the Land Office for a prospecting permit, nor have I ever tendered bond in connection therewith. I have never erected any monuments or placed any notices upon Section 30. I have never made any application to the Secretary of the Interior for a lease.

I have known Mr. Crum since 1915. He has a homestead in this area on Section 18. Mr. Crum has a part of Section 18. Mr. ter Haar has Section 20. I have the north half of Section 30. I now live in Section 14 part of the time. I have lived on Section 30 since 1927 part of the time. It is not very long since I have slept there. I have a tenant there now named Boswell. I have not made my home on Section 30 all the time since 1927, I just go there once in while to my homestead. Since 1927 I just spent part of my time on Section 30.

(Testimony of Jean Bourdieu)

RE-DIRECT EXAMINATION

BY MR. WRIGHT

The posts which I saw at the corners of Section 18 between Sections 18 and 20 and also in the corner section between 20 and 30 were about 3 or 4 feet tall. I didn't see any notice of any kind attached to those posts and know nothing about them, nor what they were for.

Before the time that I discovered that the permit had been issued on my land I was not familiar with Land Office procedure and the issuance of oil and gas permits on public lands. I didn't know how to file and obtain a permit and knew nothing about that. When I learned of the permit I knew what rights they had and what rights I had. I knew that they were supposed to send me a notice, and that I had this right. That notice was never sent.

At the time I talked with those lawyers I didn't have any money and have no money now. I own some sheep but owe money—about $5,000.00. I own no property other than my homestead in Section 30 and these sheep. At the time that I talked to the lawyers I had some sheep but I owed money then—about $11,000.00. At no time did I have money to prosecute the law suit, to prepare the trial, record and appeal, and I have not now.

My present home is about 17 miles from Coalinga. I used to drive up along Section 18 pretty often. There was no road there. Sometimes I drove up to Section 30 on Section 32 and back, a little more often than twice a year. I never saw any notice of any kind. When I saw any drilling on Section 28 I didn't know it was on lands cov-

ered by a permit that covered my land. I knew that it was not my land, but didn't know it was drilling on land covered by a permit which covered my land. I paid no attention to it. I first learned in 1930 from the Coalinga paper that the north half of Section 30 was included in a permit with other lands. It was at that time that I read about the lease having been transferred to the Kettleman North Dome Association. That was the first time that I learned that my land was involved in any other permit or lease.

RE-CROSS EXAMINATION
BY MR. CLARK

I knew that my lands were involved in a permit back in 1928 and the lease in 1930. In 1930 my business was the sheep business and also in 1928. My brother was a partner with me—also in 1927—and since I have been in the country. We keep no partnership books nor have ever kept any. The bank attends to our account—the branch of the Security First National Bank in Coalinga. In 1927 we had about 1800 or 2000 sheep in the partnership and no other live stock. In 1928 about the same number and in 1929 less, and in 1930 still less. I own no land other than Section 30. I didn't have any other homestead before. I am not interested in my brother's place in section 1. The only reason why I didn't do anything to protect my claim was because I couldn't afford it. Before 1931 I didn't believe that Section 30 was valuable for oil. It was when wells began coming in that I made up my mind to make claim to this preference.

(Testimony of Thomas M. Crum)

THOMAS M. CRUM

DIRECT EXAMINATION BY MR. WRIGHT

was called as a witness on behalf of complainant; was sworn and testified as follows:

I live in Coalinga, California, and am engaged in the jewelry business. I have lived there for thirty years and have been a jeweler for about thirty-one years.

I am the Thomas M. Crum to whom an oil and gas prospecting permit, number 09551, was issued by the Department of the Interior under date of May 29, 1921. At that time I was in the jewelry business. At the time that I made application for this permit, I did not serve notice in writing upon Jean Bourdieu informing him that I intended to make application for permit to prospect on the lands involved in this action. I did not give Mr. Bourdieu any notice at any time nor did I file any evidence of notice with the Department.

In 1924 I made an assignment of this permit to Frank Kennedy. I just made an assignment for a certain portion of the permit for a certain amount of money. I kept a little less than 500 acres of the total of 2560 acres in the permit. Subsequently I assigned the balance of the acreage to Mr. Kennedy. For these two assignments, I was paid between eight and ten thousand dollars.

We drilled a test hole in 1924 on Section 20, which is the well that has been mentioned here today. I commenced the drilling of the well and Frank Kennedy financed it. We drilled to a depth of about 511 feet in 1924. The well cost approximately $2000.00. Later it was capped and the casing left in. I could not say who capped it unless

it was the Milham Exploration Company, between 1926 and 1928. The derrick was torn down. Nothing was done further about deepening or drilling in this well.

Nothing was done with reference to drilling on Section 30 up to the time of July 1, 1931, the date of the filing of this action.

The Milham people were drilling a well in 1924 on Section 2, on some property to the south of Section 20. That was the discovery well. The Milham people had a lease or a permit to the south of Section 20. It was called the Milham lease or the Milham permit.

All that I know of any other drilling on the Crum permit was on Section 28. The well known as "Kennedy No. 1" was started in 1928. It was drilled deep and I think it was brought in in 1929. This well was located about 2 miles from the North half of Section 30. The topography between Section 28 and Section 30 is quite rough with hills, canyons and gulches.

Notice was put in a jar or in a tobacco can on the land covered by this permit within 90 days after the issuance of the permit. The notice was placed on Section 18 near the center of the section in a jar. There was a kind of a monument there and a stake and rocks piled up. I don't think we tacked or posted any notice on any posts that were on section corners—outside of that notice in the jar. I did think we posted a notice on Section 32 but am not sure now. The can or jar was covered with some rocks to protect it from blowing away. I doubt if it could have been seen by a person walking or driving by. There was a monument that could be seen for some distance if you knew what you were looking for. You

probably would not notice it over a couple of hundred feet away.

At no time was I able financially to drill a well on any of these lands to a depth required to obtain oil in Kettleman Hills.

CROSS EXAMINATION
BY MR. PHLEGER

I do not say that the well which was drilled on Section 20 in the summer of 1924 involved an expenditure of exactly $2000.00. It was probably a little more or maybe a little less. I could not say unless I looked it up. It wasn't as much as $5000.00 nor $4,000.00. That is my signature on the photostatic copy of a sight draft dated September 11, 1924 but it does not refresh my recollection as to the sum that was expended on the well. The cost could have been as much as $3060.00 but I do not know whether part of that cost was for something else. It could have been that much on the derrick and all. I do not know whether there was anything else included in that. The total cost of the well, including the lumber for the derrick, the expense incident to the drilling, the pipe and the drayage, was substantially more than $2000.00. I would have to look it up before saying that it was as much as $4000.00. I left the financing to Mr. Kennedy. I do not know exactly how much it cost to drill that well. I do not know how much the cost was per foot. I haven't any present recollection of the approximate cost.

In 1924 I had a contract with Mr. Kennedy and under that contract Mr. Kennedy agreed to put up the money that might be required to protect the permit. The con-

tract of 1924 with Mr. Kennedy read that the well was to be drilled to a depth of 505 feet and to comply with other terms. What you show me is a photostatic copy of an application for extension of time addressed to the Commissioner of the General Land Office bearing date of August 15, 1923, and that is my signature. I executed that document and swore to it before a Notary Public. It was an application for an extension. I read it before swearing to it before a Notary Public. I remember the language "that said prospecting permit was granted for the following described lands" describing the lands and including Section 30, and then continues the words: "Affiant states that he marked each of the corners of said land within the time granted him in the said permit by placing substantial monuments on said corners and that he posted a notice that said permit had been granted him together with the description of all of said lands covered by said permit on a conspicuous place at the top of a small hill near the road on the said Northwest Quarter of Section 18, in such a position so that it could readily be seen by anyone interested." As I understand the statement that has just been read, although it is quite long, it is true. I did post the notice in the manner that has just been described in that language. We did put up posts at the corners but the only place that we put the notice was on Section 18, as I stated before. (Witness reads document) The excerpt from that document (quoted above) contains a correct statement of what we did. My answer refers to what was read today from the above document.

(Testimony of Ralph Arnold)

RALPH ARNOLD

DIRECT EXAMINATION BY MR. WRIGHT

Was called as a witness on behalf of complainant. Being first duly sworn, he testified as follows:

"My name is Ralph Arnold and I reside in San Marino, California, and I am a geologist. I went to Stanford University, graduating in 1897, having taken a course in geology and mining engineering. After graduation, I spent three years in graduate work in Stanford and received a Master's Degree in 1900 and a Dr. of Philosophy in 1902. After receiving my Doctor's Degree I became a member of the U. S. Geologic Survey in the year 1903 and was connected thereafter with this Survey for six years. My duties during the first two years were devoted to paleontological work on the west coast of the United States. The last three or four years, 1905 to 1909 were devoted entirely to an investigation of oil fields in California. During that period at one time I was a member of the Land Classification Board. This Board is a kind of connecting link between the Geological Survey and the Land Office in connection with the classification of public lands on the basis of geological evidence. The Board considered evidence submitted by me as a member of the Geologic Survey.

Mr. Robert Anderson was associated with me in 1906 and 1907 in the oil fields in California when I examined the Santa Maria Field and the Coalinga Fields and Mr. Harry R. Johnson was associated with me when I investigated the McKittrick, Sunset and Midway Fields in 1908. Mr. Robert Anderson is now in Algeria.

(Testimony of Ralph Arnold)

I was doing geological work in and around Kettleman Hills for the U. S. Geologic Survey. This work was done in connection with the investigation of the oil fields and to find out all information we could and to make it available to the industry. My work there followed a program that was laid out in 1905 when I took over the oil investigation of the Survey in California. This program was to map the geology of territories in the state, which appeared to have oil possibilities. There were some homesteaders in this area who were filing agricultural homesteads. We found that there was a general tendency to try to get title to lands through filing homesteads which cost little as against oil men who were trying to get title through drilling wildcat wells, which was very expensive.

(The following letter found in Bulletin No. 623 issued by the Department of the Interior and signed by Mr. Arnold, as of June 30, 1907, was read into the record by Mr. Wright; (objection by Mr. Clark overruled and exception noted)

"Dr. George Otis Smith, Coalinga, California,
Director of U. S. Geological Survey, June 20, 1907
Washington, D. C.

My dear Dr. Smith:

I have just heard indirectly that you and Mr. Garfield and Mr. Pinchot are to be in this part of the country some time during the summer. While you are on the Coast I hope that you may induce Mr. Garfield to come up here and see if something cannot be done to settle the land question around here. The area we are mapping

(Testimony of Ralph Arnold)

this summer, including the Coalinga, McKittrick, Midway and Sunset oil districts, contains the only vacant land giving promise of being oil productive that I know of in this part of the state. This land, which, with few exceptions, is absolutely worthless except for oil land, is being taken up by homesteaders, by script and in various other ways. The legitimate oil promoters are anxious that something be done to safeguard the interests of those who are trying to gain title to the land by legitimate development, such as drilling. Will you not take up this matter with Mr. Garfield?

Very truly yours,

Ralph Arnold."

There was then read into the record, a letter on the same page, 102 of Bulletin 623, by Mr. Wright, as follows:

"Dr. George Otis Smith, Coalinga, California,
Director U. S. Geological Survey, August 13, 1907.
Washington, D. C.

My dear Dr. Smith:

After all of my writing and telegraphing, I finally made arrangements to meet Secretary Garfield in Los Angeles, where we had a very satisfactory conference regarding the land situation here. He was going to take the matter up with Commissioner Ballinger immediately, and I think will thus settle the perplexing questions for some time to come.

Very truly yours,

Ralph Arnold, Paleontologist.")

(Testimony of Ralph Arnold)

(WITNESS RESUMES:) Referring to my letter of August 13, 1907 above, when I referred to a satisfactory conference regarding the land situation, Secretary Garfield agreed with me that it would be desirable to make a withdrawal as suggested by me, covering practically the whole district, pending our detailed geologic work and recommendations as to what areas were valuable for oil and what were more valuable for agricultural purposes. I made this recommendation of withdrawal for the purpose of enabling us to make a careful survey, and, in the meantime to keep the homesteaders from interfering with development by the oil operators.

(COMPLAINANT'S EXHIBIT NO. 30 consisting of a certified copy of a letter dated August 15, 1907, addressed to the Commissioner of the General Land Office, signed by S. W. Woodruff, Acting Secretary, was offered and received in evidence over objection. Objection overruled and exception noted.) Objections made to entire line of testimony and evidence, objections overruled and exceptions noted.

BY MR. WRIGHT: Rather than read the entire document, I will state that this advises the Department, or the Secretary of the Interior, that Mr. Arnold has reported that these lands should be withdrawn from all entry pending investigation. Then follows an order of August 21, 1907, addressed to the Register and Receiver at Visalia, which is attached as a part of the same exhibit, reading as follows:

"By direction of the Acting Secretary of the Interior, dated August 15, 1907, the lands embraced in the attached list, situated in Fresno and Kings Counties, are tempo-

(Testimony of Ralph Arnold)

rarily withdrawn from agricultural entry pending an investigation of the character thereof by the Geological Survey. You will note the withdrawals on your records and thereafter accept no agricultural entries or filings therefor until further advised by this office."

Then follows a list of the lands which show many thousands of acres.

Then follows another letter of November 8, 1907, which is attached to the same exhibit, addressed to the Register and Receiver at Oakland, which is a temporary withdrawal of—well, I had better read it.

'By letter of August 21, 1907, addressed to the Register and Receiver.'

Well, this simply is advising the Oakland Register that similar lands covered by this withdrawal order are in his district or in his jurisdiction.

(BY MR. WRIGHT, continuing): It covers Townships 18 So. R. 15, 19 R. 15, 19 R. 16 and 20, Range 14. It covers many thousands of acres . . . . . practically the entire township including Section 30.

(EXAMINATION RESUMED) Q. Mr. Arnold, you are familiar with the letters and withdrawals we have just been discussing?

A. Yes, sir.

Q. Do you recall them?

A. Yes, sir.

After the temporary withdrawal of August 21, 1907, I proceeded to investigate the lands in the Kettleman Hills-Coalinga District. I prepared a map setting forth what I considered possible oil bearing lands in this area.

(Testimony of Ralph Arnold)

This map is attached to my report made to the Department.

(BY MR. WRIGHT:) "I show you a map which has been shown to counsel, which is entitled 'Geologic and Structural Map of the Coalinga District, California, Geology by Ralph Arnold and Robert Anderson', and ask you if that is a photostatic copy of the map which you prepared at that time and attached to your final report?"

WITNESS RESUMES: A. "Yes, sir."

There is indicated on this map a blue line which indicates the Kettleman Hills part of this map. The Kettleman Hills anticline is shown and the town of Coalinga. This is the East side of the Coalinga field. We classified the land as mineral between a line extending along the east side of the Coalinga field down through the middle of Pleasant Valley north of Coalinga, east of the Hackalitos Dome, and then east along the monocline of the Kreyenhagen Hills along here, and then a line which enclosed the crest of the Kettleman Hills anticline, which is shown by a blue line on this particular map. We classified the land inside the blue line as possible oil bearing lands and the lands outside as non-mineral. The section on the map marked in purple is Section 30, Township 21, Range 17 East and is outside of the blue line in which the lands were classified as possible oil bearing lands. I will put on the map "Blue line indicates limits of possible productive territory in Kettleman Hills." "Purple coloring indicates Section 30, Township 21, South, Range 17 East," in order to clarify his map for reference.

Referring to Complainant's Exhibit No. 30, introduced above, which was a temporary withdrawal order of Au-

(Testimony of Ralph Arnold)

gust 21, 1907, I have calculated that there was in the neighborhood of 600,000 acres included in that order.

(Complainant's Exhibit No. 31 consisting of a map of Coalinga District prepared by Ralph Arnold was offered and received in evidence). (Objection by Mr. Clark, overruled and exception noted.)

Referring to the map on which we discussed a blue line which I drew in 1907 when this map was prepared, and which map is attached to my report, the blue line indicates approximately the present productive limits of Kettleman Hills, except there has been a little extension toward the northwest along the axis of the anticline. The field developed further to the north and west than I had designated in 1907.

At the time I prepared the map above, we considered that all of the lands inside the blue line were possible oil bearing lands and that the lands outside of that blue line had no mineral value. We put everything inside the line that we thought had any possibility. We always lean towards the operator's end, give the benefit of the doubt to the possibility of developing oil on the lands.

(Complainant's Exhibit No. 32, recently prepared by Mr. Arnold on data as of 1907, consisting of a second map illustrating the geological work of Mr. Arnold, was offered and received in evidence merely for the purpose of illustrating Mr. Arnold's testimony.) Testimony and map objected to by Mr. Clark. Objection overruled and exception noted.

I prepared this map yesterday on the basis of the data obtained in 1907. The map shows correctly what we did and how we reached the conclusion as of that date.

(Testimony of Ralph Arnold)

I will explain our conclusions as illustrated by this map.

A. "This diagram is a cross-section from the southwest to the northeast, from the region of the Kreyenhagen Hills, where the formations outcrop across the Kettleman Plain into the Kettleman Hills. In order to avoid complications, I showed the surface as a straight line. There is not very much difference between the land in the seepage area in the Kreyenhagen Hills and the crest of the Kettleman Hills. Probably five or six hundred feet would cover the entire difference in elevation. This diagram was prepared to show the method that was adopted to estimate the depth to the formation that we believed would carry the oil. You will note on the left-hand side of this diagram the line, the memorandum that says, "Seepages in oil sand." There are large seepages in this formation, which we called the Vaqueros formation, and our study for 20 miles up and down the reef ridge district, back of the Kreyenhagen Hills, showed these seepages in this sand, and that type of evidence is the best evidence in the world of the presence of oil in the sand. So we concluded that that would be the producing horizon in that particular part of the district. As confirming our idea, the productive sands in the north end of the Coalinga district are also in this particular formation. So we had all the evidence in our favor to believe that that would be the producing horizon, and it was our business to find out how deep the Vaqueros formation lay beneath the surface at the crest of the anticline and on the flank of the anticline in the Kettleman Hills. Nature has provided us with a good many horizons in this series of beds, beginning in the bottom of the series, in the cretaceous and extending up through the various formations to the

uppermost, which is known as the Tulare. These fossils are different in the different formations, and for that reason, if you find a particular bunch of fossil shells anywhere you can tell just about where you are in the geological column. There are, I imagine, 20 different fossiliferous zones or beds, beginning at the top of the cretaceous and extending up to the Tulare. In the outcrop of these beds in the Kreyenhagen Hills it is very easy to measure the thickness of the beds, and consequently the distance from one position in the stratigraphic column to some other place in the column; and, likewise, when we went over the Kettleman Hills, we found a number of these same fossiliferous beds. In order to simplify the problem here and bring out this explanation, and really to point out the bed that was the key bed in our correlation, I mention this one that is shown in red on this diagram, known as the Mulinia. Mulinia is a clam shell of quite distinct characteristics, which was found very abundantly, and in this particular bed it made up a section several feet thick, almost entirely of this particular type of fossil. So when we measured our section in the Kreyenhagen Hills we measured the distance from this Mulinia bed back to the outcrop of the Vaqueros oil sand, and, calculating by angles, because the beds, as you note, are dipping about 45 degrees, we estimated the vertical distance, or, that is, the perpendicular distance between the Mulinia bed and the oil sand, which would give you roughly the thickness of the bed between this Mulinia bed and the Vaqueros. Then we went over into the Kettleman Hills and found this Mulinia bed in place, and, with the information that we had obtained by measuring the section in the Kreyenhagen Hills, we are enabled

to calculate and estimate just about how far below the surface the Vaqueros formation occurred in the Kettleman Hills.

Roughly, we estimated this to be about 3500 feet at the shallowest point in the hills. Then, we estimated the dip of the beds on both flanks of this anticline and drew the green lines to represent the point where we believed the Vaqueros formation was about 4500 feet below the surface. The reason we adopted the depth of 4500 feet was because the deepest well in the State at that time was about 4500 feet, and we assumed that, if we allowed another hundred feet for somebody to go a little bit deeper than the present drilling, that would be a fair average for the possible drilling depth. That 4500 feet, of course, means to the top of the Vaqueros formation. The Vaqueros formation is about 900 feet thick in this district, and some of the seepages are found in the top of the Vaqueros, and some half way down and some toward the bottom. And any oil man knows that when you have a series of sands 900 feet thick that sometimes in some places you will find the productive sands at the top, other times along the middle and possibly some other places toward the bottom of the formation. So we figured that the 4500-foot well would mean that it would just strike the top of the formation and the probabilities would be that the well would have to be drilled to at least 5000 feet to cover the possible productive beds in the Vaqueros. That is the way we reached the decision as to where we would draw the green lines.

We found that these green lines, or that our line of the 4500 foot depth, extended out from a half to a mile on each side of the axis; and from the knowledge that

(Testimony of Ralph Arnold)

we had of the California oil fields we figured that that would certainly take in to the edge of the water zone which always was found in the oil sands in the edges of the field. So we had really a double reason for drawing the lines there; first, that the depth would be prohibitive outside of those lines, and, second, that if drilling was carried on beyond those lines, water would be found in the Vaqueros formation instead of oil."

After we prepared this map we classified the land inside of the blue line as possible mineral lands and we classified the land outside of the blue line as non-mineral land. Upon the completion of our work, we filed with the Department, a full report of our geological investigations in this area with the map which has been introduced as an exhibit to that report. We filed a preliminary report that was published as Bulletin 357 before our final report. There was a great demand for this information and we hurried through our notes and prepared a general statement which covered all of the salient facts that we had discovered, including the description of the classification of the lands. That was published in 1908. I don't know the exact date but I think it was along in the summer of 1908. The official report was published in 1910. Our conclusions regarding the geology and structure were in the hands of the Land Office, I think, or in the hands of the Director, shortly after we completed our season's work, which would probably mean along some time before Christmas in 1907.

(Complainant's Exhibit No. 33, consisting of a letter dated June 17, 1908 was then offered and received in evidence and includes this language, which was read by

(Testimony of Ralph Arnold)

Mr. Wright, as follows: (Objection made, overruled and exception noted)

"I am enclosing herewith a list of the lands in the Coalinga District, California, which have been classified as mineral lands by the geologists of this Bureau. The lands specified as mineral lands include all of those lying between the outcrop of the lowest oil formation, the Tejon (Eocene), and a line marking the limits of the area in which the uppermost oil sand of the district can be reached by a well less than 4500 feet in depth." The letter goes on to describe the method of fixing this line. And it ends by saying: "It is, therefore, requested that the lands mentioned in the accompanying list be withdrawn from any but mineral land entry. It is believed that all of the other lands lying between the north line of township 19, south and the south line of township 24 south, M. D. M., and between the west line of range 14 east and the east line of range 19 east, are non-mineral bearing insofar as petroleum is concerned." Then follows, a document headed: "State of California. Mt. Diablo Meridian. Withdraw as mineral. Open up all rest between north line of township 19 south and south line of township 24 south, between west line of range 14 east and east line of range 19 east." Then follows a description of lands subject to this order.

WITNESS RESUMES: I am familiar with the lands that are described in the above letter. They are the same identical lands that are included within the blue lines which are shown on the map marked in complainant's Exhibit 31. Those in the Kettleman Hills are inside of the blue line.

(Testimony of Ralph Arnold)

My work in the Coalinga field extended from about the forepart of May to about the last week in October, and extended from the north end of the Coalinga field down to the Devil's Den district. That district included the north end of Kettleman Hills and that time also included the work which I did in the preparation of the map that is before the court. We expected to cover all of the territory from Coalinga to Sunset but we worked all summer on just about half of it. So we stopped our field work and continued the rest of the work the next summer. Our work covered thoroughly the geological structure of these lands in so far as oil-bearing prospects were concerned. We developed many of the methods of work in our investigation in that particular field. Those methods are still in use and regarded as modern and up-to-date in every respect.

The Acting Secretary, (in his letter of August 15, 1907, introduced in evidence as Complainant's Ex. No. 30) states:

"Upon completion of the geological work in the district it will be possible to indicate with considerable accuracy just what lands are mineral in character."

In reference to the above language, I subsequently, in the report, indicated the sections that in my opinion as an expert geologist, were oil bearing and those that were not. Those are the lands about which I have just testified.

In our investigation of the conditions in Kettleman Hills at this time, we did not find any surface indications of oil, that is to say, no direct evidence in the form of seepages. At the time we made the report there were

(Testimony of Ralph Arnold)

no producing wells in Kettleman Hills. No oil had been discovered there.

(It was here stipulated and so ordered by the court that all this line of testimony and all the testimony of the witness following this point was to be considered as objected to on the ground that it was immaterial and irrelevant and that exceptions were noted to the ruling of the court allowing the testimony to go in evidence.)

The approximate distance in miles to the nearest producing well was about fifteen miles. That was over near Coalinga, across the Kettleman Plains at the south end of the Coalinga field. With our final report on this district, the work of the Geological Survey was, I think, completed as to this particular field. There has not been any further investigation made by the Geological Survey in the Kettleman Hills field since that investigation to my knowledge. I spent a whole season in the McKittrick-Sunset fields in the summer of 1908, beginning where we left off the season before on the Coalinga field. Prior to our entry upon that district, the lands in the McKittrick-Sunset fields were withdrawn for classification.

(Complainant's Exhibit 34, consisting of an authenticated copy of a letter headed "Department of the Interior, United States Geological Survey," dated June 4, 1909, was offered and received in evidence and contains the following language:

"Sir: A part of the lands in the McKittrick-Sunset oil districts, California, withdrawn from entry by the Secretary on September 14, 1908, pending examination and classification by the Geological Survey, have been

(Testimony of Ralph Arnold)

examined and I classify the following lands within the withdrawn areas as oil lands."

Then comes a heading, "Lands classified as oil lands," and a long description. Then comes this language:

"The following lands within the area withdrawn by the Secretary on September 14, 1908, have been examined and are found not to be oil lands and should, therefore, be released from the existing withdrawal."

Then comes a heading, "Lands found not to be oil lands and released from withdrawal," and a description of a great number of pages.)

WITNESS RESUMES: Subsequently, on September 24, 1908, I recommended a temporary withdrawal of lands between Coalinga and Martinez, California.

(Complainant's Exhibit No. 35, consisting of an authenticated copy of a letter dated November 6, 1908, addressed to the Secretary of the Interior, was offered and received in evidence.

It states:

"Sir: I have the honor to recommend for temporary withdrawal from all entry the following townships along the southwestern side of the San Joaquin Valley, between Coalinga and Martinez on the north. This area is now being mapped topographically and will be investigated next season by the geologists of the Survey. There is considerable activity in oil development throughout portions of this territory and conditions of conflict between claimants under agricultural and mineral entries are presented, as in the Coalinga field, where a similar temporary withdrawal from agricultural entry was made pending the land

(Testimony of Ralph Arnold)

classification by the Geological Survey. George Otis Smith, Director."

Then follows the transmission of a letter dated November 10, 1908 contained in the same exhibit, directed to the Register and Receiver, Oakland, Califoria. It says:

"Under authority of the approval of date November 17, 1908, by the Honorable Secretary of the Interior of a recommendation made by the Director of the Geological Survey of November 6, 1908, the lands described in the list hereto attached are hereby temporarily withdrawn from all filing or entry, pending investigation and report by the Geological Survey, and until further direction by this office. Note on your records this withdrawal of such of the lands on the attached list as lie within the limits of the Oakland Land District, and accept no filing or entry therefor until further advised."

Then follows a long list of land.

Then there is also a letter dated November 10th, to the Register at Sacramento, with similar instructions. That showed the withdrawal of all the lands between Coalinga and Martinez, California. That does not include the lands involved in this case.)

(WITNESS RESUMES): The lands described in this last temporary withdrawal referred to in the Exhibit above, were examined by the Geological Survey. Subsequently all of them, I think, were returned for agricultural entry. Only very indefinite indication of any possible mineral value was disclosed by that investigation.

Since my work in this field in 1907 I have kept in touch with the subsequent development in the Kettleman Hills lands involved in this action; (that is, Lots 1 and 2 and

(Testimony of Ralph Arnold)

the East half of the Northwest quarter, and the northeast quarter of Section 30, 21, 17.) There was nothing developed between the time we did our work there and March 6 1919 that led me to change my opinion about the classification that we gave in 1907. In my opinion these lands became known mineral lands with the drilling of the Huffman well that was drilled on the Northwest quarter of Section 29, adjoining it, about the year 1930. The drilling of this well showed the extension of the oil-bearing beds down the axis of that anticline, quite a little ways outside of the territory that we had mapped as possible oil territory. That was the first well placed on production to the north and west of the blue line on the map introduced in evidence.

CROSS-EXAMINATION
BY MR. CLARK

I severed my connection with the Geological Surv[illegible] May, 1909.

I recall my letter of June 30, 1907 contained in Bulletin 623 to George Otis Smith which was introduced in evidence. I recall that I stated that this land, with few exceptions, is absolutely worthless, except for oil land and is being taken up by homesteaders, in various ways. I believed that there was a certain part of it that would be valuable for mineral. The people were not only acquiring the lands under the homestead laws but they were acquiring it under other forms of the mineral land law, for instance, in connection with the operations for gypsum. Land was being acquired under gypsum claims, at the same time with homesteads. We felt that they were most

(Testimony of Ralph Arnold)

valuable for oil and gas and therefore should be acquired under the laws applicable to the acquisition of oil lands only.

CROSS-EXAMINATION

BY MR. PHLEGER

The blue line shown in Exhibit 31 includes Sections 33, 34, and part of 35 in 1907. In 1907 I recommended to the Department the "withdrawal as mineral" of Sections 33, 34 and 35 of Township 21 South, Range 17 East, the nearest point of which is located approximately one mile from Section 30. The blue line may be correctly marked, "Blue line indicates limits of possible productive territory in Kettleman Hills in 1907."

(WITNESS EXCUSED)

(AFTER ARNOLD'S TESTIMONY)

BY MR. WRIGHT: If your Honor please, I would like to read into the record from the regulations of the Land Office the following: (being a portion of Section 12 thereof)

(a) "Should an application for permit for entered or patented lands, with a reservation of the oil and gas content to the United States, be filed by a person other than the entryman or owner of the land, the applicant will be required to serve "PERSONAL NOTICE," (in italics) "of such application upon the owner or owners of the land so entered or patented, with a warning therein that, if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local Land Office. The applicant must furnish evidence of the service of notice on the

owner and evidence that the party served is the owner of the land involved, either by his affidavit duly corroborated or by certificate of the officer in whose office transfers of real property are to be recorded."

If your Honor please, I desire to read a paragraph from a decision of the United States Supreme Court in reference to the filing of a bond by defendants under the 1914 law, prior to their entering plaintiff's land for the purpose of developing them. The decision involves a question whether or not the permittee who acquired the lease had to file a bond. The lessee claimed that the bond was sufficient and the Supreme Court, in denying this, used this language:

"The Circuit Court of Appeals based its decision on the part of the Act of 1914, which, after directing that the patent for the surface estate shall contain a reservation of the underlying oil and gas deposits, with the right to prospect them, mine and remove the same, provides that lessees of the United States may enter and occupy so much of the surface as may be required and mine and remove the minerals 'upon payment of damages caused thereby to the owner of the land or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damges.' The plaintiffs take the position that the bond given by the lessee and approved by the Secretary of the Interior when the lease was issued satisfied that provision. In this the plain words of the provision are neglected. They call for a bond to be given in a judicial proceeding wherein the damages may be ascertained and fixed. The Circuit Court of Appeals so regarded it."

Kinney Coastal Oil Co. vs. Kieffer, 277 U. S. at page 961

DEPOSITION OF JOHN C. ING,

Register of the United States Land Office in Sacramento, California

The deposition of John C. Ing, Register of the United States Land Office in Sacramento, California, and Custodian of the books and records of the United States Land Office, formerly at Visalia, California, was read into the record by Mr. Wright, as follows: (in reference to Sec. 30, Twp. 21 S. R. 17 E. M. D. B. M.)

(Objection made by Mr. Clark that document immaterial and irrelevant,—objection overruled and exception noted)

"Q. Referring to the serial register of these various entries recorded and which you have described relating to Section 30, state, Mr. Ing, whether or not any contest or protests have been made charging that the land is mineral in character?

A. Neither upon the tract book nor upon the serial register which pertains to those entries made in the north half of the section does there appear any record that any contest involving the mineral character or non-mineral character of the land has been filed.

Q. Mr. Ing, will you state that, so far as the records of your office show, there has not been any hearing had, or any decision rendered holding that Section 30 was mineral in character?

A. I find nothing in the record to show that any hearing was had either by this office or the former Visalia office involving the character of the land.

Q. If any decision had been rendered in a contest or protest case involving Section 30 either by the Commissioner of the General Land Office or by the Secretary of

the Interior, such decision would be entered on your record would it not?

A. That would be the regular course. Yes, sir. The rule of the office. They are placed upon the tract book or upon the Serial Register or in both places where it involves an adjudication of land.

Q. You have no notation of any such decision?

A. I have not been able to find any record of it. I don't find any."

(There follows hereafter the certificate of the phonographic reporter.)

BY MR. WRIGHT: If the court please, I wish to offer in evidence, a letter of June 7, 1909, signed by Secretary Ballinger, showing lists of lands classified as non-mineral, followed thereafter by a mineral withdrawal in the letter of June 19, 1909.

(Complainant's Exhibit No. 36 containing certified copies of letter of June 7, 1909 and letter of June 19, 1909 were introduced and received in evidence over objection. Objection overruled and exception noted)

BY MR. WRIGHT: We next offer letter from George Otis Smith, Director of the Geological Survey, to the Commissioner of the General Land Office, dated September 17, 1908, showing his recommendation for a temporary withdrawal pending completion of drilling tests on adjoining land. There is a marginal note I wish to call attention to: "Withdrawn August 21, 1907; restored July 10, 1908." Section 30 is not described in this letter.

(Complainant's Exhibit No. 37, containing certified copy, letter Dated September 17, 1908 in reference to a temporary withdrawal of land, was introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: We next offer a letter from Fred Dennett, Commissioner, dated September, 1908, to the Secretary of the Interior, advising the Secretary of classification of certain lands as oil lands included in a previous temporary withdrawal in the McKittrick-Sunset district, for examination. Section 30 is not described in this document.

(Complainant's Exhibit No. 38 containing certified copy of letter dated September, 1908 from Fred Dennett to the Secretary of the Interior, was introduced and received in evidence, over objection, objection overruled and exception noted.)

BY MR. WRIGHT: We next offer a letter of September 28, 1908 of Fred Dennett, Commissioner, to the Secretary of the Interior, advising the Secretary of the classification as mineral lands by Ralph Arnold and requesting that the lands so classified be withdrawn permanently from any but mineral land entry.

(Complainant's Exhibit No. 39 containing a certified copy of letter dated September 28, 1908 of Fred Dennett, Commissioner, was introduced and received in evidence over objection. Objection overruled; exception noted.)

BY MR. WRIGHT: We next offer if the court please, a letter of June 4, 1909 from George Otis Smith, Director of Geological Survey, to Commissioner of the General Land Office, advising that certain lands outside

of any temporary withdrawal for classification had been classified as oil lands and that certain other lands outside of the withdrawal of September 14, 1908 were classified as not oil lands. This does not mention Section 30.

(Complainant's Exhibit No. 40 containing certified copy of letter of June 4, 1909 from George Otis Smith, was introduced and received in evidence over objection; objection overruled; exception noted)

BY MR. WRIGHT: We next offer if the court please, a letter of June 22, 1909 from Fred Dennett, Commissioner, to the Registers and Receivers, advising that certain lands outside of any temporary withdrawals had been classified as oil lands and notifying them that such lands are withdrawn as mineral. The Section 30 here involved is not mentioned in this letter.

(Complainant's Exhibit No. 41 containing certified copy of letter of June 22, 1909 from the Commissioner to the Registers and Receivers, was introduced and received in evidence over objection; objection overruled and exception noted.)

BY MR. WRIGHT: We next offer a letter of March 17, 1865, by the Commissioner of the Land Office to the Secretary and to Registers and Receivers, at Humboldt, California, showing lands withdrawn as mineral, upon discovery, land that is of known mineral character. It recites that coal oil had been discovered in California and that the lands adjoining the discovery should be withdrawn as mineral.

(Complainant's Exhibit No. 42 containing certified copy of letter of March 17, 1865 by the Commissioner of the Land Office to the Secretary was introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: We next offer a letter of July 10, 1908, from the Department of the Interior to the Register and Receiver at Visalia, California, referring to the temporary withdrawal from agricultural entry of certain public lands pending investigation and classification thereof. This Section 30 is not mentioned in this letter.

(Complainant's Exhibit 43 containing certified copy of letter dated July 10, 1908 from the Department of the Interior to the Register and Receiver of the Land Office at Visalia, California, was introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: We next offer a letter addressed to Messrs. Vogelsang, Brown, Cram & Feely, Mills Building, Washington, D. C. from the Acting Assistant Commissioner, dated April 3, 1933, in which he states:

"Having reference to your letter of April 3, 1933, asking if the field notes for Section 30, Township 21 South, Range 17 East. M. D. M. California, show said section was returned as agricultural or mineral land, you are advised that the survey reports show, in part, as follows:

'Is very broken and mountainous and is used by the settlers for sheep husbandry and affords ample pasturage for thousands of sheep in springtime, but owing to its scarcity of water is not used much in summer. Grease-

wood, brush grass and sage abound. Minerals have not been found.'

The certified copy of field notes requested by you is being prepared."

(Complainant's Exhibit No. 5 containing certified copy of letter of the Acting Assistant Commissioner of the Land Office pertaining to the field notes Section 30, Township 21 South, Range 17 East, was introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: If the court please, we wish to introduce Exhibits Nos. 6 to 14 inclusive, heretofore offered for identification. They represent homesteaders whose lands were subject to an outstanding temporary withdrawal at the time of their entry and who received a preference right under Section 20 of the Leasing Act, thereby illustrating that a temporary withdrawal order was not a bar to a preference right if the homesteader was otherwise qualified. There is attached to each exhibit, a copy of the permit that was issued to the homesteader.

(Complainant's exhibits 6 to 14, inclusive, containing certified copies of official papers, were introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: We now offer, if the court please, exhibits Nos. 15 to 27, inclusive, heretofore offered for identification. These exhibits are offered for the purpose of showing that homesteaders who made entry on lands that were not subject to any withdrawal order at the time of entry, or any time but were subsequently compelled by the land office to submit themselves to the law of July 17,

1914 and to take a restricted patent, with the government reserving the mineral rights were given a preference right to prospect.

(Complainant's exhibits 15 to 27, inclusive, containing certified copies of official correspondence pertaining to the issuance of preference rights to homesteaders whose lands were not affected by an executive order of withdrawal were introduced and received in evidence over objection. Objection overruled and exception noted.)

BY MR. WRIGHT: If the court please, before we close complainant's case, we wish to read into the record the following:

"Complainant is willing to do equity, and to that end hereby offers to the defendant Pacific Western Oil Company and to any other defendant who may have expended moneys in connection with the development of said lands involved in this action to reimburse defendants for money expended by them by reason of development of said lands or by reason of assessments paid to the Kettleman North Dome Association by virtue of said lands being subject to the Kettleman North Dome Association agreement; subject, however, to the rights of the complainant to receive all moneys which have been paid to said defendants, and each of them, out of the net profits from the operations of the Kettleman North Dome Association allotable to said defendants, or any of them, by reason of said lands being subject to the Kettleman North Dome Association agreement."

It will develop in the defense, your Honor, that these lands are subject to an agreement between various operators, known as the Kettleman North Dome agreement, and that is the reason for including that provision in this offer.

(It was stipulated between counsel that defendants' Exhibit B, which is a map used to illustrate the testimony on cross-examination given by the Complainant's witnesses, was duly admitted in evidence.)

(Complainant's Exhibits No. 4-A and 4-B, consisting of two certified copies of filed notes pertaining to the exterior lines of townships 21 and 22, 17 E. including the lands involved in this action, were offered and received in evidence.) (Objection by Mr. Clark. Objection overruled and exception noted.)

It was stipulated between counsel, that the deputy surveyor making the report contained in the field notes of the above exhibits, said that the lands were agricultural lands in 1882 and that no minerals had been discovered.

Complainant's Exhibit No. 29, consisting of an authenticated copy of a letter from the Geologic Survey to Mr. Dorman advising him that since the Taft withdrawal of December 30, 1910, there had been no formal classification of the lands in Section 30 as mineral was offered and received in evidence over objection of defendants. (Objection overruled and an exception noted.)

CONDENSED STATEMENT OF CONTENTS OF EXHIBITS INTRODUCED BY PLAINTIFF.

EXHIBIT NO. 1.

Homestead entry of Jean Bourdieu, serial number, Visalia 08309, dated March 6, 1919, allowed March 6, 1919, covers Lots 1 and 2 E½ of NW¼ and NE¼ of Section 30, Township 21 S. Range 17 E. M. D. B. & M. Recites that it is made "subject to provisions and reservations and limitations of Act of July 17, 1914". A copy of this exhibit appears, as a part of the Findings of Fact herein.

EXHIBIT NO. 2.

Patent of United States Government to Jean Bourdieu covering above described land, dated 1925, which among other things, recites that "a certificate of the Register of the Land Office at Visalia, California, has been deposited in the General Land Office whereby it appears that pursuant to the Act of Congress of May 20, 1862 'to secure homesteads to actual settlement on the public domain' and the acts supplemental thereto, the claim of Jean Bourdieu has been established and duly consummated in conformity of law. * * *" Said patent also recites "also excepting and reserving to the United States all oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914. (38 Stat. 509.)" A copy of this exhibit appears as a part of the Findings of Fact herein.

EXHIBIT NO. 3.

Certificate of County Clerk of Fresno County, dated October 14, 1933, to the effect that none of the defendants have filed an action since January 1, 1914, against Jean Bourdieu for the purpose of ascertaining and fixing damages to the above described lands.

EXHIBITS NOS. 4-a and 4-b.

Certified copy of field notes of survey prepared August 19, 1882—field notes (4-a) covering exterior lines of townships 21 and 22, Range 17 S. and Township 22, Range 18 S. and (4-b) covering field notes on the interior lines of the same townships. These field notes, among other things, recite: "Township 21 S. Range 17 E. is very broken and mountainous and is used by the settlers for sheep husbandry and affords ample pasturage for thousands of sheep in the spring time, but, owing to its scarcity of water, is not used much in summer. Greasewood, sage and bunch grass abounds. Minerals have not been found."

EXHIBIT NO. 5

Letter dated April 13, 1933, signed by Julian Sears and addressed to Messrs. Vogelsang, Brown, Cram and Feely, Mills Building, Washington, D. C. reading as follows:

"Having reference to your letter of April 3, 1933, asking if the field notes of Section 30, Township 21 S. Range 17 E. M. D. B. & M, California, show certain

section was returned as agricultural or mineral land, you are advised that the survey reports in part as follows (here follows recital contained in Exhibit 4-b above quoted) The certified copy of field notes requested by you is being prepared."

EXHIBIT NO. 6.

Certified copy of oil and gas prospecting permit issued to Lillian D. Jamieson, serial number, Great Falls, Montana, 058721, dated August 4, 1925, issued under Section 20 of the 1920 Leasing Act; also certified copy of order determining appeal from the General Land Office, dated July 15, 1924, which order recites that "the area described was withdrawn on August 18, 1902 in connection with the Milk River Irrigation Project and entered by this appellant on June 3, 1904 pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388) and remains so withdrawn."

The order shows that, by executive order of January 9, 1917, the area was withdrawn and included in Petroleum Reserve No. 53. The order required that the homesteader file a mineral waiver prior to the issuance of a patent and further provided that after such waiver is filed, the appellant will be entitled to preference rights under Section 20 of the Leasing Act; further, a certified copy of a letter dated September 27, 1922, addressed to Senator Henry L. Meyers, advising the Senator that in order to acquire a patent, the homestead grantor must elect to receive a patent, subject to the conditions and reservations provided in the Act of July 17, 1914. (Plaintiffs Exhibit No. 6 is in words and figures as follows:

DEPARTMENT OF THE INTERIOR
Washington

A. 6895
Address only
July 15, 1924.
The Secretary of the Interior.

	:	"N"
	:	
Lillian D. Jamieson	:	Glasgow 03869 – 060292
	:	
	:	Entrywoman required to consent to oil and gas reservation.
	:	
	:	Affirmed.

APPEAL FROM GENERAL LAND OFFICE.

Lillian D. Jamieson, formerly Harris, has appealed from the decision of the Commissioner of the General Land Office dated February 7, 1924, which required her to amend her homestead entry for the SE¼ NW¼, N½ NW¼, NW¼ NE¼, Sec. 21, T. 32 N., R. 33 E., P. M., Glasgow, Montana, land district, so as to reserve deposits of oil and gas therein to the United States, subject to the conditions and reservations of the act of July 17, 1914 (38 Stat., 509).

The area described was withdrawn on August 18, 1902, in connection with the Milk River irrigation project, and entered by this appellant on June 3, 1904, pursuant to the reclamation act of June 17, 1902 (32 Stat., 388), and

remains so withdrawn. The entry was allowed without a mineral reservation, the lands then being neither withdrawn, classified, nor reported as valuable for oil or gas deposits. Sufficient proof of compliance as to the residence, cultivation, and improvements required by the ordinary provisions of the homestead law was made by the appellant on August 1, 1911.

By Executive order of January 9, 1917, the area was withdrawn and included in Petroleum Reserve No. 53, and is still so reserved. This withdrawal formed the basis for the requirement of a mineral waiver, complained of by this appellant.

This appeal is on the ground that the entrywoman has earned a vested right to an unrestricted patent by her compliance with the ordinary provisions of the homestead law, or in the alternative that she is entitled to a preference right to a permit pursuant to section 20, of the leasing act, to prospect for oil and gas therein, as against all other claimants.

The nonmineral land laws do not contemplate that lands known to contain deposits of oil or prospectively valuable for such deposits shall pass to homestead entrymen except with a reservation of such deposits to the United States. Foster v. Hess (50 L. D., 276). Lands withdrawn and included in a petroleum reserve are prima facie valuable for such deposits (Washburn v. Lane, 258 Fed., 524; State of Utah v. Lichliter, et al., 50 L. D., 231); and, unless final proof has been completed, including the pay-

ment of final fee and commissions, the Department must, in order to achieve the plain purposes of the act of July 17, 1914, supra, require consent to a reservation of oil and gas deposits to the United States for lands theretofore withdrawn, classified, or reported as valuable for such deposits. Jacob Terrell (49 L. D. 671). Such reservation is required, of course, subject to the entryman's right to prove at a hearing that the lands are, in fact, nonmineral. Instructions of March 20, 1915 (44 L. D., 32). This provides means whereby mineral waivers may be avoided in proper cases.

If the required mineral waiver is filed, appellant will be entitled to a preference right to permit to prospect for oil and gas, pursuant to section 20 of the leasing act of February 25, 1920 (41 Stat., 437), as against Lysle S. Bartlett, who has filed application for a permit to prospect for oil and gas pursuant to section 13 of said act. Appellant will be required to exercise this preference upon filing the required mineral waiver.

The Commissioner's decision is affirmed, and the record returned to the General Land Office for further action.

(Signed) E. C. Finney,
First Assistant Secretary.

In reply please refer to Glasgow 03869 "F" WJL

(Pencil note: Inc.
17
FPT)

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

Address only September 27, 1922.

Commissioner of the General Land Office.

Information.

Hon. Henry L. Myers,
United States Senate.

My dear Senator:

In reply to your inquiry of September 15, 1922, enclosing a communication from Robert S. McKellar, of Glasgow, Montana, relative to homestead entry 03869, of Lillian Harris (now Jamieson) for SE¼ NW¼, N½ NW¼, NW¼ NE¼, Sec. 21, T. 32 N., R. 33 E., M. M., you are informed that the records of this office fail to show that a farm unit plat has been approved covering any portion of said land, or that public notice has issued announcing the availability of water for the irrigation thereof, and, therefore, inasmuch as this entry was made and is now subject to the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), it would appear that satisfactory proof of reclamation could not be made at this time, and that office letter of September 18, 1911, substantially quoted by your correspondent, still holds good, except that upon making final reclamation proof, claimant is not required to pay all the reclamation charges but only the annual installments which have matured up to the date of said proof.

The records further show that by Executive Order of January 9, 1917, all of the above described land was included in Petroleum Reserve No. 33.

With regard to the entryman's right to the oil and gas in the land, you are informed that this office cannot undertake to pass upon this matter until a specific case involving the question is properly presented for adjudication in accordance with the regular procedure.

However, in this connection your attention is invited to a recent decision of the United States Supreme Court, rendered March 20, 1922, in the case of Irwin vs. Webb, et al (66 L. Ed. 333) 42 U. S. Sup. Ct. Reporter, 798, which involved the right of the State of Arizona to tax lands in a homestead entry which lands are subject to the Reclamation Act of June 17, 1902 (32 Stat., 388), and are situated within the Salt River Irrigation Project, on which entry no final certificate or patent had yet issued. The Court held that a homestead entryman whose land is subject to said act does not, merely upon fulfillment of the requirements of the general homestead laws, acquire an equitable title to the land, for the reason that a number of steps remain to be taken by such entryman to establish his claim under the Reclamation Act and to entitle him to a final certificate; and the court therefore held that such land is not taxable until final certificate has issued on the entry.

In the case of Cleveland Johnson (48 L. D. 18), the Department held in effect that an equitable title does not vest in a homestead claimant until he has done all that the law and regulations prescribe and that where there is a mineral discovery on the land, or where the land is classified or withdrawn as mineral before an equitable title has vested, the homestead claimant must elect to receive a patent subject to the conditions and reservations pro-

vided in the Act of July 17, 1914 (38 Stat., 509), or suffer the cancellation of his entry.

For your further information, I am enclosing circulars 323 and 672. Your attention is especially invited to paragraph 12 of the last-named circular.

Your correspondent's letter is herewith enclosed, together with a carbon copy of this letter for your files.

Very respectfully,

(Signed) William Spry,
Commissioner.

(Pencil note: 21-2112)

(Rubber stamp: "This entry allowed subject to the provisions of the act of June 17, 1902 (Public No. 161)."
(4-007)

HOMESTEAD

Application)
)
No. 1618.)

LAND OFFICE at Great Falls, Montana,
May 24th, 1904.

I, Lillian D. Harris, of Saco, Valley County, Montana, do hereby apply to enter, under Section 2289, Revised Statutes of the United States the SE¼ NW¼, N½ NW¼, NW¼ NE¼ of Section 21, in Township 32 N. of Range 33 E., containing 160 acres.

(Signed: LILLIAN D. HARRIS.

(Rubber Stamp:

"Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509)."

(Pencil note:

as to oil & gas. JTK/N 1-19-25)

LAND OFFICE at Great Falls, Montana.
June 3, 1904.

I, J. M. Burlingame, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

(Signed) J. M. BURLINGAME
Register.

(This Exhibit also includes Oil and Gas Prospecting Permit from United States Land Office at Great Falls, Montana, Serial No. 058721, to Lillian D. Jamieson, of Glasgow, Montana, which Permit is dated August 4, 1925, and signed by E. C. Finney, First Assistant Secretary of the Interior. The lands covered by this Permit are not in California.)

In the condensed statement of evidence it is hereby stipulated that Exhibit No. 6 illustrates the type of evidence contained in the class of exhibits numbered from 6 to 14, inclusive. Exhibit No. 6 is inserted and the others up to and including number 14 are omitted, as they are cumulative in character.

EXHIBIT NO. 15.

Certified copy of the homestead entry of Hubert Francois under serial number 031718, U. S. Land Office, Los Angeles, California, dated August 29, 1918, and allowed September 7, 1918, together with a certified copy of oil and gas prospecting permit, serial number 035120, United States Land Office, to Hubert Francois, dated October 24, 1922, together with certified copy of Commissioner's letter under date of June 21, 1922 addressed to the Register and Receiver of Los Angeles, California, requiring the said Hubert Francois to file in the Land Office, his consent to a reservation in the Government of the oil and gas contained in the land as embraced in his homestead entry and granting him a preference right to an oil and gas prospecting permit under Section 20 of the Leasing Act in the event of filing such consent. The original homestead entry bears upon its face the stamped notation as follows:

"Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914, 38 Statutes 509."

This letter also recited that the original cancelled homestead entry allowed September 7, 1918 to Hubert Francois was without oil and gas reservation. (Plaintiffs Exhibit No. 15 is in words and figures as follows:

(Pencil notes: 5:20 F. G. B. A. M.)

(Rubber Stamp: Fees $10.00
Comm. $12.00
Pur. Mon. $3.20
Test fees $.....
E. N.)

(Rubber Stamp: Filed "M" H. E.)

(Rubber Stamp: Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat., 509).)

(Rubber stamp in margin: Jan. 29, 1925,
Refund Ordered $7.60,
"M", J. A. R. 185).

(Rubber stamp: Received $25.00 U. S. Land Office
Date: Aug. 29th, 1918
Hour: 3 P. M.)

	$2.50
Excess	3.20
F & C	22.00
	25.20

(Rubber Stamp in margin:

Application made in accorddance with and subject to the provisions and reservations of the Act of July 17, 1914, (38 Stat., 509).

1030

Form approved by the Secretary of the Interior

December 16, 1911.

DEPARTMENT OF THE INTERIOR

HOMESTEAD ENTRY

Los Angeles, California,

Serial No. 031718
Receipt No. 1857954
9/7/18

APPLICATION

I, Hubert Francois (male) a resident of Saticoy, Ventura County, California, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the NW¼ SE¼; SE¼ SW¼ and Lots 4 and 5, Section 22, Township 3 N., Range 21 W., S. B. Meridian, containing 161.28 acres, within the Los Angeles, California, land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I am naturalized (born in France) citizen of the United States, and am forty-eight years of age and married; that my post-office address is Saticoy, California; that this application is honestly and in good faith made

for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws, or filed a soldier's or sailor's declaratory statement, except ---- none ---- that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said

land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

(Signed) HUBERT FRANCOIS.

(Rubber Stamp: Examined and Passed. K. E. M'O.
Mar 17, 1919.
Feb. 20, 1919, Posted,
185-38
W. H. H. F. Div. c.

1031

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by personal papers); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Los Angeles, Los Angeles County, California, within the Los Angeles land district, this 29th day of August, 1918.

(Signed) B. F. GROVES
Register.

UNITED STATES LAND OFFICE

at Los Angeles, Cal.
Sept. 7, 1918.

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

(Signed) B. F. GROVES

Register.

UNITED STATES CRIMINAL CODE.—Chap. 6.

Sec. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, March 4, 1909. 35 Stat., 1111.)

1032.

Los Angeles 034550 "NP" AHH
1 X R. & R.

June 21, 1922.

Proceeding under paragraph 12(c) circular 672.

Register and Receiver,

Los Angeles, California.

Sirs:

On November 16, 1921, Dozier Lewis filed application 034550 under the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on Lot 1, Sec. 21, NW¼ SE¼, SE¼ SW¼, Lots 4 and 5, Sec. 22, T. 3 N., R. 21 W., S. B. M.

It appears from the records of this office that Lots 4 and 5, NW¼ SE¼, SE¼ SW¼, said Sec. 22, is embraced in homestead entry 031718 allowed September 7, 1918, to Hubert Francois without oil and gas reservation.

Pursuant to the procedure outlined in paragraph 12(c) of the regulations under the leasing act the Director of the United States Geological Survey reported that the geologic conditions existing under this land are such that opportunity for prospecting should not be denied. He, therefore, recommended that a prospecting permit be issued to the applicant entitled thereto.

Inasmuch as the above entry was made prior to the passage of the leasing act of February 25, 1920, the above entryman is entitled to a preference right under section 20 of the leasing act to a permit to prospect for oil and gas upon the land embraced in his homestead entry provided that he exercises such right by filing a proper application

and at the same time consent to a reservation of the oil and gas content of the land to the Government.

You will, accordingly, serve notice upon said entryman that the land embraced in his homestead entry 031718 has been reported as having a prospective oil and gas value, and that he will be allowed 15 days from receipt of notice hereof within which to file in the local land office his consent to a reservation to the Government of the oil and gas content of the land embraced in his homestead entry; or to show cause, if any, why he should not consent to the mineral reservation or to appeal herefrom.

If the entryman desires to exercise his preference right under section 20 of the leasing act to a permit to prospect for oil and gas on the land embraced in his homestead entry he must do so by filing a proper application therefor within the time allowed above, and should he fail to do so his preference right will be considered as waived and further action will be taken looking to the granting of a permit under section 13 to applicant Lewis who will be required to furnish a bond in the sum of $2,000 as security for any damage to the crops and improvements of the entryman resulting from drilling or other prospecting operations.

Any showing of cause or appeal filed by the entryman must bear evidence of service by copy thereof upon the oil and gas claimant.

Serve notice of this decision on the parties in interest and in due time report with evidence of service.

Very respectfully,

Commissioner.

6-15-cse

(This exhibit also includes an Oil and Gas Prospecting Permit from the United States Land Office at Los Angeles, California, Serial No. 035120 to Hubert Francois of Santa Paula, California, dated November 24, 1922, and signed by F. M. Goodwin, Assistant Secretary of the Interior. The lands covered are not those involved in the case before the court.)

It is hereby stipulated between counsel that the evidence contained in Exhibit No. 15 illustrates the type of evidence contained in Complainant's exhibits beginning Number 15 and ending Number 29. Complainant's exhibits Nos. 16 to 27, inclusive, are consequently omitted in this condensed statement of evidence.

EXHIBIT NO. 28.

(Copy of Senate Document No. 232) (Withdrawn).

EXHIBIT NO. 29.

Letter directed to Mr. A. B. Dorman, care of Vogelsang, Brown, Cram & Feely, Washington, D. C. under date of July 17, 1931, signed by Julian D. Sears, Acting Director, reading as follows:

"In reply to your informal inquiry of July 15, 1931 requesting to be advised of the date of any formal classification made by the Geological Survey of Section 30, township 21 S. Range 17 E. M. D. B. & M. Subsequent to order of withdrawal on December 30, 1910, Petroleum Reserve 16, California, No. 7., the Geological Survey has not made a formal mineral classification of this section."

EXHIBIT NO. 30.

Letter addressed to the Commissioner of General Land Office, dated August 15, 1907 from Geo. W. Woodruff, Acting Secretary, reading as follows:

"August 15, 1907.

The Commissioner of the General Land Office.

Sir:

I am informed by Mr. Ralph Arnold of the Geological Survey, who is at present investigating the oil resources and making a geological map of Coalinga and adjacent fields of California, that certain government lands near Coalinga, presumably oil bearing, are being entered under the homestead laws. I am further informed that upon the completion of the geological work in the district, it will be possible to indicate with considerably accuracy just what lands are mineral bearing.

Until the completion of the detailed map which will be furnished during the coming winter, Mr. Arnold requests that all government land lying within the territory enumerated on the accompanying page, be temporarily withdrawn from homestead entry. It is said that nearly, if not quite all of the land mentioned is unfitted for agricultural purposes, and that most of the entries recently made in this region under the homestead and *scrip* laws are of such character as to indicate to the most casual observer that the mineral and not the agricultural resources are the ones sought.

In view of the conditions I hereby direct you to temporarily withdraw the lands described in the accompanying list.

Very respectfully,

George W. Woodruff,

Acting Secretary.

(Notification to Register and Receiver, Visalia, August 21, 1907)

(Notification to Register and Receiver, Oakland, November 8, 1907)

List of Lands to be Temporarily Withdrawn from Agricultural Entry in Fresno and Kings Counties, California."

Here follows a description of the lands, totaling in excess of 500,000 acres; also temporary withdrawal of lands, dated August 21, 1907 signed by Fred Dennett, Acting Commissioner and addressed to Register and Receiver, Visalia, California, reading as follows:

"Sirs:

By direction of the Acting Secretary of the Interior, dated August 15, 1907, the lands embraced in the attached list, situate in Fresno and Kings Counties, are temporarily withdrawn from agricultural entry pending an investigation of the character thereof by the Geological Survey. You will note the withdrawals on your records and thereafter accept no agricultural entries or filings therefor until further advised by this office."

Then follows, a list of lands to be temporarily withdrawn from agricultural entry, being the same lands described in the letter signed by George W. Woodruff; also a letter dated November 8, 1907 addressed to Register and Receiver, Oakland, California from Fred Dennett which advises the receiver at Oakland that certain of the lands described in the August 21st letter were within the Oakland Land District and advising the Register to note the withdrawal thereof on his records and to accept no agricultural entries until further advised.

EXHIBIT NO. 31.

Map of Coalinga District prepared by Ralph Arnold, legend reads, among other things:

"Blue line indicates limit of possible production territory in Kettleman Hills in 1907. Purple coloring indicates Section 30, Township 21 S. Range 17 E."

Copy of this Exhibit is contained in the separate book of Exhibits, hereby referred to and incorporated here.

Exhibit No. 32.

Map of hypothetical geologic cross-section along Fresno Kings County line from Kregenhagen Hills to Kettleman Hills, prepared by Ralph Arnold and dated 1907.

EXHIBIT NO. 33.

Letter from George Otis Smith, Director to the Commissioner of General Land Office, dated June 17, 1908, and reading as follows:

"June 17, 1908

The Honorable, The Commissioner of the General
Land Office,
Washington, D. C.

Sir:

I am enclosing herewith a list of the lands in the Coalinga District, California, which have been classified as mineral lands by the geologists of this Bureau. The lands classified as mineral include all those lying between the outcrop of the lowest oil-bearing formation, the Tejon (Eocene) and a line marking the limits of the area in

which the uppermost oil sand of the District can be reached by a well less than 4500 feet in depth. This basis of classification is believed to give a wide margin to the oil producers, as, with one or two exceptions, no successful wells over 4400 feet in depth have been drilled in the California oil fields.

In dealing with oil lands it must be borne in mind, however, that absolute determination, by work on the surface, of the occurrence or non-occurrence of oil in any one locality is not possible. The best that can be done is to calculate the degree of probability on the basis of surface indications and structural conditions. Such calculations have been made in the Coalinga field and the lands mentioned in the accompaning list are believed to be those which future development will prove to be more or less oil-bearing.

It is therefore requested that the lands mentioned in the accompanying list be withdrawn from any but mineral land entry. It is believed that all of the other lands lying between the north line of T. 19 S., and the south line of T. 24 S. M. D. M., and between the west line of R. 14 E. and the east line of R. 19 E. are non-mineral bearing in so far as petroleum is concerned.

Very respectfully,

GEO. OTIS SMITH,
Director.

State of California, Mount Diablo Meridian.
Withdraw as Mineral Land.

Open up all rest between north line of T. 19 S. and south line of T. 24 S. between west line R. 14 E. and east line of R. 19 E."

Then follows description of lands withdrawn as mineral land.

EXHIBIT NO. 34.

Letter of June 4, 1909 addressed to the Commissioner of the General Land Office by Geo. Otis Smith, reading as follows:

"Sir:

Part of the lands in the McKittrick-Sunset oil Districts, California, withdrawn from entry by the Secretary on September 14, 1908, pending examination and classification by the Geological Survey, have been examined, and I classify the following lands within the withdrawn area as oil lands:

Lands Classified as Oil Lands:

(Description)

The following lands within the area withdrawn by the Secretary on September 14, 1908, have been examined and are found not to be oil lands and should, therefore, be released from the existing withdrawal

Lands found not to be oil lands and released from Withdrawal

(Description)

Lands Withdrawn, Which Should Remain Withdrawn Pending Examination and Classification.

(Description)

The lands classed as oil lands, the areas found not to be oil lands, and the area in which field work is now being

done and which should remain withdrawn, are shown graphically on the accompanying map.

Respectfully,

Geo. Otis Smith,
Director."

EXHIBIT NO. 35.

Letter of November 6, 1908 from Geo. Otis Smith, Director, to the Secretary of the Interior, reading as follows:

"Sir:

I have the honor to recommend for temporary withdrawal from all entry the following townships along the southwestern side of the San Joaquin Valley, between Coalinga and Martinez on the north. This area is now being mapped topographically and will be investigated next season by the geologists of the Survey. There is considerable activity in oil development throughout portions of this territory and conditions of conflict between claimants under agricultural and mineral entries are presented, as in the Coalinga field where a similar temporary withdrawal from agricultural entry was made pending the land classification by the Geological Survey.

Very respectfully,

Geo. Otis Smith,
Director.

Approved November 7, 1908.

James Rudolph Garfield
Secretary.

(Notification to Register and Receiver, Oakland, November 10, 1908)

Lands Recommended for Temporary Withdrawal in the *Monte* Diablo Range between Canuta Creek and San Francisco Bay."

(Description)

Also letter of November 10, 1908 from Fred Dennett, Commissioner, addressed to Register and Receiver, Oakland, California, advising him that "the lands described in the list hereto attached are hereby temporarily withdrawn from all filing or entry pending investigation and report by the Geological Survey and until further direction by this office."

Also letter of November 10, 1908 to the Register and Receiver, Sacramento, from Fred Dennett, Commissioner, to the same effect.

EXHIBIT NO. 36.

Letter of June 7, 1909 from R. A. Ballinger, Secretary of the Interior, to the Director of the Geological Survey, reading as follows:

"Sir:

I am in receipt of your letter of June 4, 1909, enclosing lists of lands in California, heretofore withdrawn for classification, 430,340 acres of which you have classified as oil land, and 544,480 as not containing deposits of oil.

* * * * * * * * *

The withdrawal of the lands classified as containing deposits of oil in the lists accompanying your said letter will be continued temporarily pending consideration of legislation upon the question, unless it be shown by reclassification, or sufficient evidence, that any particular

tract or tracts thereof do not in fact contain deposits of oil. The lands classified in the lists as nonmineral will be restored to the public domain for disposition under the public land laws appropriate thereto.

Very respectfully,

R. A. Ballinger,
Secretary."

Also letter of June 19, 1909 from R. A. Ballinger, Secretary of the Interior, to the Commissioner of the General Land Office, containing, among other things, the following language:

"Sir:

I am in receipt of petitions from the Mammoth Oil & Gas Company of Vale, Oregon, and other corporations and individuals, requesting the withdrawal from entry of certain lands in Malheur County, Oregon, stated to be unfit for agricultural or grazing and chiefly valuable for their deposits of petroleum oil and gas. The purpose of the withdrawal is stated to be that the lands may be prospected and exploited for their mineral deposits. The tracts involved are described as follows:

(Description)

In view of the decisions of the courts to the effect that there can be no reservation of public lands from sale except when authorized by some treaty, law or authorization from Congress, I must hold that I am not authorized to withdraw the land for the purpose indicated. However, there has been introduced in Congress a bill, Senate 2623, which proposes radical changes in the method of acquiring and disposing of public lands of the United States con-

taining deposits of oil and, in view of the pendency of this legislation and of the further fact that lands in the State of California, withdrawn by my predecessor, and classified as containing deposits of oil, are withheld from entry because of pending legislation of this nature, I have to direct that the lands here involved be temporarily withdrawn from all forms of location and disposal under the public land laws, subject to valid existing rights, pending consideration by Congress at its next session of the bills hereinbefore described.

"You will make appropriate notations on your records and advise the local land officers hereof."

"Applications selections, entries and proof based upon locations, settlement, or right initiated prior to the date of withdrawal may be received by the Local Land Officers and allowed to proceed under the rules up to and including the submission of final proof. The purchase money will not be received or final certificates of entry issued in non-mineral cases pending investigation as to the validity of the claims with regard to the character of the land."

Also letter dated June 26, 1909 from Fred Dennett, Commissioner, to the Register and Receiver, Burns, Oregon, entitled "Alleged Oil Lands temporarily withdrawn" in which there appears, among other things, this language:

"Under direction of the Secretary, dated June 19, 1908, the following described lands are temporarily withdrawn from all forms of location and disposal under the public land laws, subject to valid existing rights, pending consideration by Congress at its next session of Senate Bill 2623, which proposes changes in the method of acquiring and disposing of public lands of the United States containing deposits of oil."

You will make appropriate notations on your records. Applications, selections entries and proof based upon locations, settlement or right initiated prior to the date of withdrawal may be received and allowed to proceed under the rules up to and including the submission of final proof. The purchase money will not be received or final certificates of entry issued pending investigation as to the validity of the claims with regard to the character of the land.

EXHIBIT NO. 37.

Letter dated September 17, 1908 from Geo. Otis Smith, Director, to the Commissioner of the General Land Office, reciting in part as follows:

"Sir:

Under date of August 15, 1907, the acting Secretary of the Interior directed you to temporarily withdraw certain lands near Coalinga, Cal. pending examination by the Geological Survey. On June 19, 1908, I sent you a list of lands in the Coalinga District which had been classified as mineral by the geologists, and requested that those be withdrawan from any but mineral land entry. The basis for the classification was given, and the belief was expressed that all of the other lands lying between the north line of T. 19 S and the south line of T. 24 S. M. D. M., and between the west line of R. 14 E and the east line of R. 19 E. are non-mineral bearing, in so far as petroleum is concerned.

I am now informed by Geologist Arnold that among the lands thus restored to agricultural entry there are some tracts which are considered oil land by operators in the Coalinga field. Three companies at least have started wells in the territory under question and two of these three have expended at least $50,000 each in drilling.

As soon as the land in the vicinity of these "wild-cat" wells was thrown open to homestead entry, filings were made on all of the land around these prospect wells, irrespective of whether or not there were mineral filings on the same. In fact, the quarters filed on by the oil men were the ones most eagerly sought by the "scrippers".

As a matter of opinion, the geologists believe that the classification of last June is correct, but as a matter of policy it seems to them that an effort should be made to protect these operators long enough to allow them to prove or disprove their belief that the land in question is oil bearing.

The land in question lies south of Coalinga, and is pronounced by the geologists as having little or no agricultural value, and in this opinion I concur, from my own observation last year. I recommend that the debatable strip, including the lands described below, be again temporarily withdrawn from agricultural entry, pending the exploration in progress by the oil men. I am confident that the operators are acting in good faith, and deserve protestion, inasmuch as they are backing their judgment by large expenditures in drilling. I have discussed the matter with Secretary Garfield, and he authorizes me to express his approval of this recommendation, provided there are no complications other than those which I have set forth.

The following are the lands recommended for temporary withdrawal, pending the completion of the drilling tests.

(Description follows)

Geo. Otis Smith, Director."

EXHIBIT NO. 38.

Letter dated September 8, 1908 from Fred Dennett, Commissioner, addressed to the Secretary of the Interior and approved by Frank Pierce, First Assistant Secretary on September 14, 1908, reading as follows:

"Sir:

I am in receipt, from the Department, of letter of the Acting Director of the U. S. Geological Survey, dated August 25, 1908, requesting the temporary withdrawal from homestead entry, of the lands covered by a map of the McKittrick-Sunset Oil District, California, excepting, however, certain lands shown on the map, which are in a part of the Coalinga Oil District and were classified as oil lands on June 17, 1908.

It appears that the lands for which the withdrawal is requested, are in Kern and San Luis Obispo counties, California, and adjoin on the south, the lands in the Coalinga Oil District in Fresno and King counties, California, which were withdrawn under Departmental order of August 15, 1907.

On June 17, 1908, this office was in receipt of a report from the Director of the U. S. Geological Survey, classifying, as oil lands, certain of the lands included in the withdrawal of August 15, 1907, and opening up others to entry.

The Acting Director refers to the portion of said report of June 17, 1908, in which it is stated that, the lands classified therein are believed to be those which future development will prove to be more or less oil bearing, as his reason for recommending the withdrawal of the lands in the McKittrick-Sunset Oil District.

I would respectfully recommend, that the lands be temporarily withdrawn from agricultural entry, pending their examination and classification by the U. S. Geological Survey.

A list of the lands for which the withdrawal is requested, is herewith attached.

Very respectfully,

Fred Dennett,
Commissioner.

(Description)."

EXHIBIT NO. 39.

Letter dated September 28, 1908 from Fred Dennett, Commissioner, addressed to the Secretary of the Interior, reading in part as follows:

"Sir:

I am in receipt, under date of September 17, 1908, of a letter from Mr. George Otis Smith, Director of the Geological Survey, recommending the temporary withdrawal of certain lands in the Coalinga oil district, California, in order that drilling tests for oil may be completed therein.

His reasons for making this request are set forth in his letter from which I quote the following:

(Here follows copy of letter from Geo. Otis Smith to the Commissioner of the General Land Office, dated September 17, 1908—Exhibit 37).

The lands involved herein, together with other lands adjoining, were withdrawn from agricultural entry "pend-

ing investigation of the character thereof by the Geological Survey" by office letter of August 21, 1908, under direction of the Acting Secretary of the Interior dated August 15, 1907, and were restored to all forms of entry by office letter of July 10, 1908, approved by tne Department, on the recommendation of the Directors of the Geological Survey under date of June 17, 1908.

In view of the facts set forth by the Honorable Director, I concur in his conclusions, and recommend that the lands be temporarily withdrawn from agricultural entry pending the completion of the drilling tests now going on.

A list of the lands for which withdrawal is requested is attached herewith.

Very respectfully,

Fred Dennett,
Commissioner.

Approved October 2, 1908,

Frank Pierce,
First Assistant Secretary."

EXHIBIT NO. 40.

Letter dated June 4, 1909 from Geo. Otis Smith, Director, to the Commissioner of the General Land Office, reciting as follows:

"Sir:

In connection with the examination for classification of lands in the McKittrick-Sunset oil districts of California, withdrawn from entry by the Secretary on September 14, 1908, certain lands outside that withdrawal

were examined by geologists of the Survey, and I classify the following as oil land:

Land Classified as Oil Land

(Description)

The remainder of T. 31 S. R. 25 E. outside the withdrawal of September 14, 1908, and not included in the above list, I classify as not-oil land.

Respectfully,

Geo. Otis Smith
Director."

EXHIBIT NO. 41.

Letter of June 22, 1909, from Fred Dennett, Commissioner, to Register and Receiver, Visalia, approved by Frank Pierce, acting secretary on June 22, 1909, reciting as follows:

"Sirs:

Referring to office letter of even date advising your office of the classification by the U. S. Geological Survey of certain lands within your district, included in withdrawals made by order of the Secretary of September 14, 1908, you are advised that the U. S. Geological Survey have classified as oil lands the following tracts that were outside of the withdrawal:

Lands classified as oil:

(Description)

The lands are temporarily withdrawn from agricultural entry pending the consideration of legislation upon the subject, unless it be shown by the reclassification, or suf-

ficient evidence, that any particular tract or tracts thereof do not in fact contain oil. Make proper notation hereof upon your records.

Very respectfully,

Fred Dennett,
Commissioner.

Approved by
FRANK PIERCE
Acting Secretary
June 22, 1909."

EXHIBIT NO. 42.

Letter issued by J. M. Edmunds, Commissioner, addressed to Department of the Interior, General Land Office, on March 17, 1865, which reads in part as follows:

"I have received your report of the 5th of January last, stating that 'petroleum or coal oil has recently been discovered upon portions of public lands lying in township 2 S. Ranges 1, 2 and 3 W. also township 1 S Range 2 W. Humboldt Meridian * * *' That 'you are under the impression from all you can gather relative thereto that petroleum or coal oil deposits in that section are extensive and destined to become valuable' * * * It is not the policy of the Government to deal with petroleum tracts as ordinary public lands any more than with auriferous or other mineral or saline lands. Hence you will report the exact description of any and all tracts strictly of the character you mention and will withhold the same from disposal by the Government unless otherwise specifically instructed."

EXHIBIT NO. 43.

Letter of July 10, 1908 from S. F. Proudfit, Acting Commissioner, to Register and Receiver, Visalia and Oakland, California, reading as follows:

"Sirs:

By office letters of August 21 and November 8, 1907, certain described lands situated in Fresno and King Counties, were temporarily withdrawn from agricultural entry pending an investigation of the character thereof by the Geological Survey, and you were directed to note the withdrawals on your records, and thereafter, to accept no agricultural entries or filings therefor until further advised by this office.

I am now in receipt of a report dated June 17, 1908, from the Director of the Geological Survey, in which the lands described in the list hereto attached are classified as oil lands. You will note this classification on your records.

Applications for these lands as mineral may be presented, received and adjudicated under the existing mining laws and regulations, but applications under the agricultural laws must be accompanied by ex-parte affidavits alleging the non-mineral character of the tracts applied for and must be forwarded to this office for consideration, whereupon, if the showing made appears sufficient a hearing will be ordered to determine the real character of the land, the burden of proof, in view of the classification, being upon the agricultural claim.

The remainder of the lands withdrawn by said letters of August 21 and November 8, 1907, and not hereby classified, with the exception of those withdrawn in townships 25 S. R. 17, 18 & 19 E. and townships 26 S. R. 18, 19, 20, and 21 E. are restored to filing and entry under the

general land laws. The townships above described will be made the subject of a communication in the future.

Very respectfully,

S. V. Proudfit,
Acting Commissioner.

Approved July 10, 1908,

Frank Pierce,
Acting Secretary."

Also letters dated September 8, 1908 to the Register and Receiver, at Oakland and Visalia, California, reading in substance as follows:

"Referring to office letter of July 10, 1908, advising your office of receipt from the Director of the U. S. Geological Survey of the classification of certain of the lands in Fresno and King counties, included in the temporary withdrawal of August 21, 1907, it is observed that the last paragraph of said letter is in error in that Township 25 S. Range 20 E. was not included in the list of townships that were excepted from the restoration for future consideration.

You will accordingly note your records in accordance herewith.

When further report upon these lands is received, you will be duly advised."

Fred Dennett, Comm.

DEFENDANTS' CASE

EDWARD C. FINNEY

BY MR. CLARK

Was called as a witness on behalf of the defendants. Being first duly sworn, he testified as follows:

My residence is in Washington, D. C. where I am engaged in the practice of law. I was connected with the Department of the Interior. I entered the Department of the Interior on September 1, 1894 and left the service on April 17, 1933. My connection with the Department was continuous between those dates with the exception of a gap of six months during the year 1911, when I was practicing law in Washington. At the end of the six months, I was reinstated. In September, 1894 I entered the mineral division of the General Land Office and served as Examiner of Mining Claims and Contests to 1907. I was then made a law clerk and served for two years, until 1909, reviewing work from all divisions, including the mineral division. In my connection with the mineral division, before I became a law clerk, it was my duty to examine applications and entries for mineral land of all types, including oil lands. Oil lands at that time were enterable under the Placer mining laws. It was also my duty to consider and examine the records in contest cases between two individuals or between the government and an individual and to prepare decisions for the approval of the Commissioner. In March, 1909, I was appointed Assistant to the Secretary of the Interior. He was Secretary Ballinger. I served there through the years 1909, 1910 and part of 1911. By direction of Secretary Bal-

linger, I reviewed most of the matters which came to the Secretary for consideration, involving reclamation, mineral lands, restorations, and withdrawals of various types and represented him before Congressional Committees. After being out six months and reinstated, I served then to 1913 as Assistant Attorney in the office of the Solicitor of the Interior Department. My duties as Assistant Attorney were to review appeals coming before the Secretary's office for determination and to prepare decisions for consideration by the Secretary or Assistant Secretary. I reviewed appeals relating to oil lands, mining cases and homestead cases. I was then appointed by Secretary Lane to be a member of the Board of Appeals and remained in this position until March, 1921. The Board of Appeals was authorized by Congress and was composed of three persons to review practically all matters involving legal questions which were going to the Secretary for action. On this latter date, I was appointed First Assistant Secretary of the Interior and served in that capacity until until March, 1929. The duties of the First Assistant Secretary are defined by statute and by order of the Secretary. The duties are largely quasi judicial. In connection with these duties I wrote a very large number of land decisions during the eight years I served. They are the decisions that are published and known as the Land Decisions of the Department of the Interior. We published the leading cases or the ones that establish new principles. After ceasing to be First Assistant Secretary, I was appointed Solicitor for the Department of the Interior in March, 1929 and served in that capacity until April, 1933. At that time I severed my connections with

(Testimony of Edward C. Finney).

the Department of the Interior and entered into private practice.

(Defendant's Exhibit C, consisting of an authenticated copy of order of withdrawal of December 30, 1910 was offered and received in evidence.) (A copy of this document appears as a part of the findings of fact herein.)

The document which you hand me, marked Defendant's Exhibit C, and which purports to be a photostatic copy of an executive order dated December 30, 1910, I have examined and will state that I saw the original of the instrument. I first saw the original on or about December 29, 1910, when Assistant to the Secretary of the Interior. My initials are opposite a reference of the paper to the President. My initials "E. C. F." also appear on the last endorsement on the foot of the order. I placed the initials on the original. It was my duty to review for the Secretary such matters and it was the practice to indicate approval by placing my name on the document. If I disagreed, it was a practice to place a memorandum expressing the reason why I could not recommend its approval. At the time the original of that instrument reached me, it bore the signature—of H. C. Rizer, Acting Director. My initials also appear on the last page of the document. When I placed my initials at that place, the original bore the signature of William H. Taft. After the President had approved the order, it was necessary that it be transmitted to the Commissioner of the General Land Office for notation upon the records of his office and it was part of my duty to see that that was carried out. The intials and words: "To R. and R., Visalia, 1-3-11. W. P. W." means that a copy of this

(Testimony of Edward C. Finney)

document was forwarded to the Register and Receiver of the Visalia Land Office on January 3, 1911 by W. P. Williams, the writer of the letter. The markings indicate that it was referred to one of the divisions of the General Land Office "N", the mineral division, because of the endorsement "Noted in N, 1-6-11."

(It was stated by Mr. Wright that there was no question that the land described on the second page of Defendants' Exhibit C, included the lands involved in this case, and that it is the land described in part in plaintiff's entry papers, plaintiff's patent, the Crum permit and the lease to Pacific Western Oil Co. and Kettleman Oil Corporation.)

I personally cooperated with others in the Department in drawing a form of order of withdrawal of December 30, 1910, which is defendants' Exhibit C. After the enactment by Congress of the Pickett Act of June 25, 1910, this form of order was drawn up. After the act of Congress was approved it was determined by the Department that a form of withdrawal order should be prepared in a lawyer-like and legal manner, to follow as far as appropriate the language of the statute itself, that is the Pickett Act of June 25, 1910. We considered it advisable to have a general form rather than to have different wording in each order. We cooperated in drawing up a general form in effect and substance like this one which was used very generally in making departmental withdrawals under the Pickett Act. By Departmental withdrawals, I mean Executive withdrawals.

The language "Reserved for classification" was taken from the language of the Pickett Act of June 25, 1910.

(Testimony of Edward C. Finney)

The words "Classification of lands" are used in the statute. Also the words "withdrawn from settlement, sale or entry" are used in the statute. Our effort was to get as nearly a uniform form as possible and go along with the language of the statute and at the same time to state the purpose for which the withdrawals were being made.

The first contact that I had with an executive order of withdrawal was the order of September 27, 1909. That was the so-called Taft withdrawal order which was adjudicated to be within the power of the President by the Midwest oil decision. Prior to September 27, 1909, it had been the practice of the Department to classify lands for the purpose of disposition. In other words, it was the duty of the Secretary of the Interior to dispose of coal lands only under what were known as the coal land laws; and the same with placer oil and mineral, which were disposable only under the placer mining laws. If it was desert land, non-mineral in character, it was subject to entry under the desert land laws. So that it had been the practice of the Department to make withdrawals from time to time for purposes of classification, in aid of proper disposition. For illustration, the statute with respect to coal lands, fixed a minimum price and withdrawal for coal classification was also for the purpose not only of determining whether it was coal or non-coal land, but if determined to be coal, to determine its content, and to fix what was deemed a proper price on the disposition of that mineral.

The old mining laws as to Placer oil or placer gold, fixed a flat price of $2.50 per acre, so that any withdrawal

(Testimony of Edward C. Finney)

of lands of that type could only be for the purpose of classifying them as mineral or nonmineral. Along in 1909, and possibly in 1908, there was a change in policy discussed, and in 1909 actually adopted by the President and by the Secretary of the Interior. It was felt that the coal laws were inadequate and inappropriate and too limited to fit coal. It was felt that the Placer mining laws were inadequate for the disposition of oil and gas, and possibly potash, nitrates and asphaltic minerals, for several reasons; the acreage which might be taken was too limited for a large and expensive operation, and the government had no control whatever after patent issued, and in order to prevent waste or regulate the drilling of wells, a sentiment grew up, and was advocated by prominent men in the Government, for a change in the law from a sales act to a leasing act. In the summer of 1909 President Taft, Secretary Ballinger, and Director George Otis Smith, of the Survey, were all traveling through the west and met at Salt Lake City, and discussed this very problem. As a result of that meeting, the Acting Secretary of the Interior, Mr. Frank Pierce, received a message from Salt Lake City, suggesting or directing the withdrawal of a lot of these lands. It was to be made primarily in aid of proposed legislation and for the purposes of classification. Some changes were to be made in existing laws which would be better adapted to those various classes of minerals.

MR. WRIGHT: If the court please, I would like to move to strike the portion of the answer, the latter portion, in which he is giving his opinion as to the meaning of the law; also the portion of his answer which is based on some communication, as not the best evidence.

(Testimony of Edward C. Finney)

THE COURT: With the exception of the testimony about the telegram, the motion is denied. As to that, the motion is granted.

Very promptly we prepared orders now known as the Taft Withdrawal orders. In saying we, I mean the Geological Survey, the officers of the Secretary's office, including myself, and they were transmitted by the Acting Secretary of the Interior, Mr. Pierce, to the White House, for approval. As a result of the telegram from Salt Lake City from Secretary Ballinger, orders of withdrawal in harmony with the direction or suggestion contained in his telegram, were prepared in the Department.

(The telegram from Secretary Ballinger above referred to was read into the record, it appearing in Bulletin 623 at page 135.)

MR. CLARK: I desire to read into the record for the information of the court, a public document taken from Bulletin 623 at page 135, which is the famous withdrawal order of September 27, 1909:

"The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommendation which covers approximately 3,041,000 acres of which the larger part is probably private land and not affected by this withdrawal.

Director of Geo. Survey

(Testimony of Edward C. Finney)

"TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

Then follows a description of that tremendous area that was withdrawn.

(WITNESS RESUMES): The above order was prepared immediately after the receipt of the telegram from Secretary Ballinger.

I was called into consultation by officials in the Geological Survey, and we agreed upon a form of words to use in carrying out the desire of the President and Secretary. You see, this was a new departure, a new policy. This marks the dividing line between the old policy of withdrawing and classifying for disposition, and withdrawing completely, with the idea of getting new legislation. So that this was, as I say, a new proposition, and subsequently we all took part in trying to draft appropriate language to carry out the President's order.

I do not know that any withdrawals prior to that time used exactly the words "withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws." I

(Testimony of Edward C. Finney)

do not recall any that used the exact words "withdrawn from all forms of entry, location or sale."

The mechanical work and the impetus for the drafting of the order of December 30, 1910 came from the Geological Survey. The order or form of order came from there and it bore the signature of the Acting Director of that Bureau.

(It was stipulated by and between counsel that so much of Bulletin No. 623 issued by the Department of the Interior as is contained between the words "orders and correspondence" on page 59 and the end of the volume, to and including page 247 but no further, is deemed in evidence for all purposes.)

The order of September 27, 1909, was, by order of President Taft, ratified, confirmed and continued by the order of July 2, 1910. That order was followed by other executive orders relating to other petroleum lands on the public domain. In fact, those withdrawals continued through 1910, 1911, 1912 and 1913, up to the year 1914. As a historical fact, pressure from the west was exerted upon the Department of the Interior after the withdrawal of September 27, 1909. The effect of these withdrawals was to tie up large areas of public lands, not only from agricultural entry, homestead entry, but also from entry under the mining laws, and vigorous protests and complaints were made by individuals and by members of Congress and others from the West against tying up the resources of the western states. It, of course, stopped development. Then there was also complaint by another class, by homesteaders, who had made original homestead entry and had not yet perfected their claims and earned

vested rights. The effect of these withdrawals was to suspend or possibly to defeat, homesteaders from completing their title, if the withdrawal occurred after the homestead entry and before the submission of final proof. The Department had been considering and continued to consider and advocate the enactment of laws which would relieve the situation and would carry out the policy adopted by President Taft and Secretary Ballinger of locking these petroleum lands pending future legislation looking toward the disposition of the petroleum lands.

After the complaints by homesteaders mentioned above, legislation was introduced in Congress which ultimately resulted in the Act of July 17, 1914. I was present as a representative of the Secretary of the Interior in sessions of the Committee on Public Lands.

Then the Act of July 17, 1914 was enacted. Both prior and subsequent to that Act we had been working on drafts for the leasing of the petroleum lands and certain other mineral resources. I drew a rough draft of a leasing act to cover petroleum, gas and phosphate and other minerals named in the present act of February 25, 1920. The Secretary called into conference Senator Myers, Chairman of the Senate Committee on Public Lands, Scott Ferris, Chairman of the House Committee on Public Lands and Senator Walsh and a revised draft of proposed legislation was prepared at this conference. Then followed a period of eight years approximately, during which Congress was considering the proposed leasing bills. A great many open committee hearings were held. Paper locations had been made prior to the withdrawals where no discoveries had been made and no vested right in the lands had been se-

cured and this feature occupied quite a good deal of time. The original draft of the leasing legislation did not contain Section 20 or anything that now appears in Sec. 20. During the last two or three years of consideration of leasing legislation, it was inserted into the bill, between 1918 and 1920. I mentioned a moment ago withdrawals after September 27, 1909 and after the withdrawal of December 30, 1910; there were several reserve withdrawals—numbers 1 and 2 in California occured in 1912. Those are the Elk Hills Reserves No. 1 or the Naval Petroleum Reserve.

BY MR. CLARK: Letter of transmittal from the Director is dated August 8, 1912, addressed to:

"The Honorable

The Secretary of the Interior.

Sir:

In accordance with your instructions to recommend for inclusion in a special reserve a compact body of public lands containing an ample supply of fuel oil for the use of the United States Navy, I have prepared and recommend for submission to the President the following order of withdrawal involving approximately 38,069 acres in the Elk Hills, Kern County, California.

Very respectfully,

Geo. Otis Smith, Director.

August 10, 1912
Respectfully referred to the President
with favorable recommendation.
Walter L. Fisher, Secretary."

Then follows the text of the order.

"ORDER OF WITHDRAWAL
Naval Petroleum Reserve No. 1."

"IT IS HEREBY ORDERED that all lands included in the following list and heretofore forming a part of Petroleum Reserve No. 2, California No 1, withdrawn on July 2, 1910 from settlement, location, sale, or entry, and reserved for classification and in aid of legislation under the authority of the Act of Congress entitled, "The Pickett Act" shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use and benefit of the United States Navy until this order is revoked by the *Pres-* or by act of Congress."

The words used in withdrawals for other than purposes of potash, phosphate, nitrate, oil, gas, petroleum or other asphaltic minerals, with one exception, are not the same. The exception is power site withdrawals. Practically the same language is used in withdrawals for power sites reserved for classification and in aid of legislation, because at the same time the Department was considering probable and proposed legislation respecting power sites on the public domain.

(Defendants' Exhibit D, purporting to be General Land Office Circular No. 672, approved March 11, 1920, was offered and received in evidence.)

Sections 12 and 12½ of said regulations are in words and figures as follows:

"12. PREFERENCE RIGHT OF OWNER OF SURFACE.—Under section 20 of the act a preference

right to a prospecting permit is given to an entryman or owner of land not claimed under any railroad grant, under the following conditions: (1) The entry must have been made prior to February 25, 1920; (2) the entry must have been bona fide under and pursuant to the act under which made; (3) the entry must have been made without a reservation of the oil and gas, for land unwithdrawn, not classified as oil and gas land, and not known to be valuable for its oil or gas deposits, at date of entry; (4) in case the entry is patented, it must have been with a reservation of the oil and gas to the Government; if the entry is not patented, the entryman must waive all right under the entry to the oil and gas in the land; (5) if the entry has been assigned or transferred, such assignment or transfer must have been prior to January 1, 1918.

(a) Should an application for permit for entered or patented lands with a reservation of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve personal notice of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded.

(b) The preference-right applicant must show that he is entitled under the section above outlined; together with his qualifications, to hold a permit as previously set forth in these regulations, and if such an application be filed, the Secretary of the Interior will award the permit to the party entitled thereto.

(c) If the land, either withdrawn or unwithdrawn, is covered by an unpatented nonmineral entry without a reservation of the oil and gas content to the Government, a prospecting permit may not be granted so long as the entry subsists without such reservation. In cases where applications for prospecting permits are filed by persons other than the entrymen for land in this status such applications will be referred to the United States Geological Survey for classification as to the prospective oil value of the land affected. If the Geological Survey shall conclude and report that the land embraced in such a nonmineral entry is without prospective oil or gas value, the application for permit will be rejected as to such land; but if the Geological Survey shall report that the land has a prospective oil or gas value and offers a favorable opportunity for prospecting operations, then the General Land Office will direct the proper local officers to serve notice on the nonmineral entryman to the effect that said land has been reported as valuable for its oil or gas content, and that the said entryman will be allowed fifteen (15) days within which (1) to file in the local office his consent to a reservation to the Government of the oil and gas content of the land embraced in his entry and in which to exercise his preference right, if any, to a prospecting permit for said land by filing a proper application

therefor, or (2) to show cause, if any there be, why he should not consent to the mineral reservation, failing in either of which his entry will be canceled without further notice. The local office will thereupon report the action taken to the commissioner, whereupon (1) if the nonmineral entryman shall have failed to take any action, order of cancellation of the nonmineral entry will be made and action taken on the prospecting permit accordingly; (2) if consent to the reservation shall have been filed, a prospecting permit will be granted to the entryman or the former applicant, as the case may be, for the reserved mineral deposits; (3) if the nonmineral entryman shall submit a showing why the entry should not be impressed with a reservation of the mineral to the Government, such showing will be referred to the Geological Survey for consideration and report. If upon the receipt of such report the department shall conclude that the land is without mineral value, the application for prospecting permit will be rejected; but if the department shall conclude that, notwithstanding the showing made by the entryman, the land has a prospective oil and gas value, such action will be taken as the facts may warrant.

From the above it will be seen that it is desirable on the part of any applicant for a prospecting permit for land already embraced in a nonmineral entry without a reservation of the mineral, and likewise desirable on the part of any nonmineral entryman who is contending that the land is nonmineral in character, to submit with their respective applications or showings as complete and accurate geological data as may be procurable, preferably the reports and opinions of qualified experts.

(Testimony of Edward C. Finney)

(d) In case of conflict between a preference-right claim under section 20 of the act and one claimed by virtue of section 18 or 19, the issue will be determined on the basis of priority.

(e) Claimants under this section of the act may combine their holdings for the purpose of making joint application for a permit, provided the aggregate area does not exceed 2,560 acres and that all the lands for which application is made are within an area of 6 miles square or within the same township.

(f) The right of a permittee under a preference-right permit to a lease after discovery is governed by other provisions of the act, as set forth in section 8 of these regulations.

12½. ASSIGNMENT OF PERMITS.—Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable."

I helped to draw the regulations contained in Exhibit D, being regulations concerning oil and gas permits and leases. They are marked "Approved March 11, 1920." Clay Tallman, Commissioner of the General Land Office, Charles Mahaffie, Solicitor of the Department and myself were directed by Secretary Lane, after the passage of the Act of February 25, 1920, to prepare a set of regulations and forms for use in administering the Act. This particular pamphlet is a reprint of the same regulations. The circular proper is dated March 1, 1920 and bears the words "Approved, John Barton Payne, Secretary," and there was a reprint as amended October 29, 1920. There

(Testimony of John D. Northrup)

was also a reprint dated 1929. There were no changes made. The circular is a reprint of the one of October 29, 1920. Up to and including page 32 are the regulations proper, approved by John Barton Payne, Secretary. On pages 33 and 34 are abstracts of rulings interpretative of the regulations. I just wanted to make it clear that there were some interpretations of the regulations embodied in the circular. We all have the 1929 print which has not been changed since October 29, 1920.

JOHN D. NORTHRUP

Was called as a witness on behalf of defendants. Being first duly sworn, he testified as follows:

(Direct Examination by Mr. Clark)

I am now employed by the United States Geological Survey at Washington, D. C. in the capacity of assistant chief of the conservation branch and chief of the mineral classification division of that branch. As such chief, I have custody of the files and records of the mineral branch and custody of and responsibility for files and records of the Geological Survey relating to mineral land classification. The documents under my charge relate to the classification of lands thought to be oil-bearing. I have been in charge of those records for twelve years. I know what the duties of the Land Classification Board were in 1910 and thereafter. I have seen the minutes of the meeting of the Land Classification Board of December 27, 1910. I cannot state particularly when I saw any particular board minutes, there are so many records of minutes which I would see from time to time in consulting the files. I have doubtlessly seen them many times in the past several years. Recently I had occasion to make search for those

minutes at the request of Judge Holloway, who is present here. That search was made on approximately October 3, 1933. He asked for information used probably as the basis for certain language used in transmitting that letter with the order of withdrawal of December 30, 1910.

I refer and he was referring to the language in the letter of December 28, 1910 from H. C. Riser, Acting Director, U. S. Geological Survey, addressed to the Secretary of the Interior, reading as follows: "Information received from the field indicates that the following lands are valuable for oil."

When he made the request above, I immediately went to the room where we keep the file containing this record. The record is part of the records of the conservation branch of the Geological Survey. I came here with the permission of my superior in the Government Service pursuant to subpoena and brought with me this official document from the files of the Geological Survey. I went to the source to ascertain where I could locate the minutes of the meeting of December 27th, if there was a meeting on that date. I went to this file which I hold in my hand. I got this file from the files of like records maintained in the conservation branch of the Geological Survey, which are kept under my jurisdiction and custody. Referring to the language on the last page, it told me precisely where to look for those minutes.

The notations made on this page under date of November 21, 1910 relate to a different withdrawal which was returned from the Secretary of the Interior for correction of certain matters. When the original was transmitted to the office of the Secretary, it bore the number,

(Testimony of John D. Northrup)

"Petroleum Reserve No. 16" which was returned and later was sent over under a different number. So it has no particular bearing on this actual withdrawal of Petroleum No. 16 California No. 7. This letter in this file which I have is a press copy. It is dated January 3, 1911 from the Assistant Commissioner of the General Land Office to the Register and Receiver at Visalia entitled "Order of Withdrawal, Petroleum Reserve No. 16, California No. 7," and is a press copy.

(Defendants' Exhibit E, a copy of the files of the conservation branch of the Geological Survey, was offered and received in evidence.) This file contained cross-reference to file relating to Petroleum Reserve No. 16, California No. 7, recommended Dec. 28, 1910, approved Dec. 30, 1910, and letter of Jan. 3, 1911 to Register and Receiver, Visalia, Cal., advision of order of Dec. 30, 1910, and Record Data of T. 20 S., R. 16 E., M. D. M. at Board action of Dec. 27, 1910.

I made a search for the minutes of December 27, 1910. I conducted a thorough search of the entire files of the Geological Survey for the minutes of the oil board meeting of December 27, 1910. That search, continued probably for a half day although it extended over four or five days subsequent to October 3rd, and into the following week. I instructed others to check my search and to otherwise try to locate the file. I looked elsewhere than in the files of the Geological Survey, in the official files of the Office of the Secretary of the Interior. We failed to find the file. There were other matters in it besides minutes, including the customary information relating to the specific township involved. The specific township file that we

were searching for was 21 South, 16 East, and it contained any geological information that the board had on that specific township other than that published in the regular Survey Bulletin.

The file containing the geological information, if the board had any, relating to Township 21, Range 17 East, is in its place in the files of the conservation branch.

The minutes of the meeting were in the file of Township 21-16. The records of the minutes could not be found. I don't recall that the file relating to Township 21 South, Range 17 East had any geological data other than a cross-reference to the file relating to Township 21 South, Range 16. It had a reference to the published information in Arnold's bulletins on the Coalinga District.

I have been chairman of the Mineral Division of the Land Classification Board since August 1, 1921. The practice of issuing orders of withdrawal containing words like those in the order of withdrawal dated December 30, 1910 has continued down to the present day. With respect to mineral lands it has.

CROSS-EXAMINATION

BY MR. WRIGHT

My superior at the present time is Herman Stabler. Mr. Sears is administrative geologist and at times is Acting Director of the Geological Survey and then he is superior to me. In the absence of the Director he is customarily Acting Director.

(Testimony of Max W. Ball)

MAX W. BALL

DIRECT EXAMINATION
BY MR. CLARK

was called as a witness on behalf of the defendants. Being first duly sworn, he testified as follows:

I am a consulting petroleum engineer and live in Denver, Colorado. I was connected with the Geological Survey of the United States Government. I am a geologist, having graduated from the Colorado School of Mines at Golden and have a degree of Engineer of Mines. I was formerly a trustee of that institution. I graduated from that institution in 1906 and have a degree of Master of Laws from the National University of Washington. I entered government service on August 3, 1906 as field assistant on coal land classification in Wyoming. I was president of the Rocky Mountain Association of Petroleum Geologists in 1921 and 1922 and president of the American Association of Petroleum Geologists in 1923 and 1924. I am the Max W. Ball who compiled Bulletin No. 623 which is entitled "Petroleum Withdrawals and Restorations Affecting the Public Domain". The work contained in that Bulletin was done under my supervision or by me.

In the summer of 1906 I was field assistant on coal land classification in Wyoming. The following winter and until the 1st of June 1907 I was engaged in the same work in Washington. In 1908 I worked in mapping of coal fields in Wyoming in charge of a party. In 1908, in the fall, the Land Classification Board was organized and I was transferred to it. The conservation movement was then just getting under way. The necessity arose for

performing a function which the Survey always had, but hadn't fully exercised. Since 1879 the Survey had been charged with the classification of public lands. Beginning about 1905 the Geological Survey began to exercise the function of classification. In the fall of 1908 there was created a specific organization to handle it. Later it was created into an independent branch co-ordinate with geologic and topographic and was known as the Land Classification Board. The oil section of the Board was commonly called the oil board. That was the Land Classification organization which started in the fall of 1908. I was transferred to it on its organization as an attaché of the mineral section, which included particularly oil. I remained in that capacity until the fall of 1910 when I was made chairman of the Land Classification Board oil section and remained Chairman until the first of April, 1916.

I know Robert Anderson whose name appears as junior geologist with Mr. Ralph Arnold in Bulletin 398 on the Coalinga District. I have know him since 1907. I do not remember when he left the Survey. It was along in 1911 or 1912. The Land Classification Board consisted of Robert Anderson, Carroll H. Wegemann and myself, in December 1910.

I was chief geologist of the Rocky Mountain Division of the Shell interests from June, 1917 to April, 1918 and manager of their Rocky Mountain work from then until the first of May, 1921. From May, 1921 to November, 1928 I was president of various producing and pipe line companies affiliated with the Standard Oil Company of Indiana. Since November, 1928 I have been doing in-

(Testimony of Max W. Ball)

dividual consulting work and heading various companies of my own.

BY MR. CLARK: Mr. Ball, I hand you Defendants' Exhibit C, entitled "Order of Withdrawal," dated December 30, 1910. Will you please examine that document, which is a photostatic copy, and, after you have examined it, state about when you first saw the original? Let me put it in another way. State whether or not when you first saw the original of that instrument it bore any signatures at all?

(WITNESS RESUMES): When I first saw the order of withdrawal dated December 30, 1910 (Defendants' Exhibit C) it was just out of the typewriter and did not bear any signatures. I saw it either the afternoon of December 27th or the forenoon of December 28, 1910. I drew the document at the time. There was a meeting of the Land Classification Board prior thereto, which I called on December 27, 1910. I think it was in the forenoon of that day. Mr. Robert Anderson was present, Mr. W. C. Mendenhall and I think Carroll H. Wegemann, although I am not sure of his presence. I called the meeting as Mr. Anderson had suggested that some new information bearing on the prospective value of oil lands lying to the north and west of the lands at that time in the Kettleman Hills area had been received. I drew the minutes of that meeting. I have no copy of the minutes. Had I not just heard Mr. Northrup's testimony, I would have said a copy could be found in the files of the Geological Survey. There were two things to be considered at the meeting in the way of new information brought by Mr. Anderson. One

(Testimony of Max W. Ball)

was that deeper drilling was being done and was in prospect than had been contemplated at the time the original classification had been made, classifying Sections 33, 34 and part of 35, of Township 21 South, Range 17 E. and lands to the south and east thereof in the Kettleman Hills area. Since that classification had been made deeper drilling had been done which would warrant lands underlain by prospective oil-bearing formations at greater depths being considered as mineral land, as oil and gas lands; also the drilling of the Pulvodero well in Section 2 of 21-16 had given some additional information with regard to the prospective value of land in that strip lying between the Kettleman Hills withdrawal and the Coalinga withdrawal on the northwest. We had the information that the Pulvodero well was drilling on Section 27 on December 27, 1910.

(Defendants' Exhibit F, consisting of a map issued by the Department of the Interior on November 1, 1915, showing withdrawals in the State of California. Base Map enlarged from the General Land Office base, was offered and received in evidence.) (A copy of this map is included in the Separate Book of Exhibits, hereby referred to and incorporated.)

This map introduced above, was made under my supervision. There is certain information on the map with respect to the status of lands which are entered and entitled to entry, that was compiled by Mr. J. H. G. Wolf and checked under my supervision. The information shown there concerning withdrawals is correct and was all my own information. I will mark in blue pencil on the map Section 30, Township 21 South, Range 17 East, M. D. B. & M.

(Testimony of Max W. Ball)

BY MR. CLARK: Now, Mr. Ball, will you please state to the court what happened, what took place at the meeting of the Land Classification Board, December 27, 1910, with respect to the lands, or any of them, described in Defendants' Exhibit C, the order of withdrawal of December 30, 1910?

BY MR. WRIGHT: That is objected to, if your Honor please, as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled. Exception noted.

(WITNESS RESUMES:) At the meeting of the Land Classification Board on December 27, 1930, the evidence brought in by Mr. Anderson was discussed and considered and the decision reached that the lands should be classified as oil and gas lands. They were so classified.

Q. Now, you refer to what lands? The decision was reached that what lands were to be classified as oil and gas lands?

A. The lands covered by Petroleum Reserve No. 16, California No. 7, created by the President on December 30, 1910.

MR. WRIGHT: If the court please, I want to object to that specific question, "were they so classified," as not the best evidence, and incompetent, irrelevant and immaterial, and calling for a conclusion of this witness.

THE COURT: Overruled. Exception noted and motion made to strike answer.

(Testimony of Max W. Ball)

After holding the meeting our next step was to draft the minutes and draft a letter for the signature of the Acting Director, transforming that action into a report to the Secretary, accompanied by an order of withdrawal creating a petroleum reserve. That is the document which I have in my hand and which I drew and which is Defendants' Exhibit C.

The same practice and procedure was followed in connection with the withdrawing of petroleum lands from all forms of entry and location as long as I was chairman and was followed in all cases. It was a procedure to make an examination of the evidence available and a determination that the land was or was not of mineral oil character. The procedure was to make a classification on the basis of that evidence, and then prepare the necessary letters for the director to sign and the necessary order for the President to sign.

Along in 1912 we had some evidence that one section included in this area embraced within the order of December 30, 1910 was not oil land and we held a meeting and classified it as nonoil and prepared an order of restoration. That was Section 8, Township 21 South, 17 East. I will mark that on the map in red; that section was restored to all forms of entry. The President signed the order of restoration.

By MR. CLARK: At page 279 of Bulletin 623, I have forgotten the number of the exhibit, appears the following:

(Testimony of Max W. Ball)

"The Honorable, March 30, 1912
The Secretary of the Interior.

Sir:

The following land included in a State indemnity selection, and reported upon by a mineral inspector of the General Land Office, appears to be nonoil in character. I therefore recommend the submission to the President for appropriate action of the following order of restoration involving 640 acres. These lands are not included in Power-site reserves or in national forests."

Signed by George Otis Smith, and approved by Samuel Adams, Acting Secretary, April 15, 1912.

Then follows the order of restoration:

"PETROLEUM RESTORATION NO. 11—
CALIFORNIA NO. 6

"It is hereby ordered that so much of the orders of withdrawal made heretofore as affects the land hereinafter described be, and the same is hereby revoked, for the reason that the Director of the Geological Survey reports that this land is not valuable for the purpose for which withdrawn."

(WITNESS RESUMES:) The order referred to as "having been made heretofore" is the one of December 30, 1910, being defendants' Exhibit C.

BY MR. CLARK: "And it is further ordered that all such lands not otherwise reserved or withdrawn are hereby restored to the public domain and shall become subject

(Testimony of Max W. Ball)

to settlement and entry under the laws applicable thereto under such date and after such notice as may be determined upon by the Secretary of the Interior. Signed William H. Taft."

(WITNESS RESUMES:) The map as shown, being Defendants' Exhibit B, represents by a jagged red line the limits of the area classified as oil land at the meeting of December 27, 1910; and in making that classification, as in all such cases, the land was considered forty by forty so that it wasn't just a blanket withdrawal of a whole township, or even of whole sections, but the line was drawn carefully and with a great deal of thought along the boundary of the best estimate we could make of what would prove to be petroleum land.

At the time of the Board meeting on December 28, 1910, we had before us the map shown by plaintiff's Exhibit No. 31. Since the date of the Arnold report in 1908 the Board had received new information from the Coalinga District through Mr. Anderson who had collaborated with Mr. Arnold in 1908. As a result of that information, we did not detract from Mr. Arnold's report in the least. We extended the area which had been withdrawn on his recommendation, along the axis of the Kettleman Hills anticline, to tie up with an area withdrawn along the same axis further to the northwest, Sections 33, 34 and part of 35 had been included in Dr. Arnold's recommendation of classification as oil land, and remained withdrawn. Those sections had been originally classified on the recommendation of Dr. Arnold, kept in withdrawal from agricultural entry, converted into a withdrawal from all forms of entry, on September 27, 1909 by the Taft

withdrawal order, confirmed by the confirmatory order of July 2, 1910, after the passage of the Pickett Act, and were in that status at the time of this board meeting of December 27, 1910. That included 33, 34, and a part of 35, and lands on to the southeast of those. This map of December 27, 1910 extended the mineral area to the north west including the area shown within the red boundaries.

CROSS EXAMINATION
BY MR. DORMAN

The meeting referred to took place in the Geological Survey then on F Street in Washington. Neither the Secretary of the Interior nor the Commissioner of the General Land Office constitute a member of the Board. Robert Anderson, C. H. Wegeman, W. C. Mendenahll (ex officio) and myself, Chairman, were members of the Board and at the meeting, which lasted all forenoon and possibly into the afternoon. Such meetings were the regular, frequent thing in classifying other lands under similar circumstances. The minutes were drafted by me and were typewritten and were placed in what we called the "Record Data File." The minutes were not published. Very careful records were kept in that file. The minutes were drafted, typewritten and filed and then there was a series of cross-records to those records, to which Mr. Northrop referred. That was done in this case.

These minutes were not published. We did not have occasion to publish them. We published the results of the minutes, rather than the minutes themselves. The results of this meeting would show in Bulletin 623. They showed

in the letter from the Director to the Secretary, which we considered an official classification itself, because it was a report by the Director of the Geological Survey to the Secretary that such and such lands were valuable for oil, or were not valuable for oil, as the case might be. We considered our letter a formal classification, the letter transmitting the withdrawal order. The results of our action in classifying are revealed in Bulletin 623.

When the Secretary of the Interior approves the classification letter transmitting the withdrawal order to him, that is all the announcement he needs to make showing a classification. The Secretary did not see the minutes of the meeting as the minutes were seldom sent to the Secretary. The minutes were not transferred to the Commissioner of the General Land Office.

I do not know whether Mr. Anderson had done any field work in this area in Kettleman Hills between the time that the Anderson-Arnold report was filed and the time that this meeting was held. He had been in the field doing field work in that part of the state doing work between Coalinga and Martinez. I don't know whether he had done any detailed work in Kettleman Hills on this particular land. I don't remember now. He probably reported what he had done. I don't remember him saying that he had been over on this land in Kettleman Hills investigating it further. I am not sure whether he reported that he had been doing detailed work in the Kettleman Hills area or not. My impression is very

(Testimony of Max W. Ball)

strong that he had made an excursion of some sort into that territory. Mr. Anderson brought the report that someone was drilling a well in Section 2, township 21, 16. I don't remember who he said was drilling the well. He said Section 2 was probably oil land. As a result of this meeting, we transmitted the letter of December 28, 1910. The letter, as transmitted, included the land described therein, comprising about 18,480 acres. We considered that the best geologic evidence we had indicated that the 18,000 acres was mineral. You can't have known oil and gas land until you drill a well and produce oil.

The well in Section 2 alone would not have induced further withdrawal. It was one of two or three considerations which gave us further geological information. We included only lands which we thought the evidence at hand indicated might be oil lands. Part of the evidence we had was the fact that some one was drilling a well on Section 2 and that there had been some showings of oil in the Pulvodero well. I do not remember how deep that well was at that time but oil was showing at a comparatively shallow depth. The information was valuable as confirming geologic inferences available from our geologic information at hand.

I published this book and compiled the information which was very carefully gone into.

The early withdrawals included much agricultural land as they were made before we had much geologic information about the area. When the policy was first adopted of withdrawing lands from agricultural entry, in order to permit unimpeded oil development, it was necessary that action be taken quickly, to protect a new and de-

veloping oil industry, without taking the time to send parties into the field and getting the complete geologic information and then acting. Consequently, in order to protect the oil industry in that way, large blanket withdrawals were made of whole areas. Reference has been made here in the testimony to the withdrawing of everything from Coalinga clear north to San Francisco Bay. Later, however, when the policy was changed and the Department was withdrawing lands from all forms of disposition, not merely from agricultural entry, but from all forms of disposition or in the wording of the act, from all forms of location, sale or entry, to have withdrawn large blanket areas then would have stopped development entirely. To accelerate it and facilitate it, orders then were made after classification, instead of before, and that was helped by the fact that during the interim we had acquired a large amount of geologic information which made it possible to act promptly and precisely, rather than necessitating a large blanket order.

The largest withdrawals were made in 1907, 1908 and early 1909. At September 27, 1909, you get to a very critical point, because that marks the change of policy from the old withdrawals from agricultural entry to the new withdrawals from all forms of disposition, sale and entry. All withdrawals were considered temporary, because we were hoping constantly for the passage of the Leasing Act, which would terminate the necessity for the withdrawals. We didn't dream that it was going to take until 1920 before Congress passed the Leasing Act.

AFTER MR. BALL'S TESTIMONY.

BY MR. CLARK: We have no further questions. If the court please, that ends this section of our testimony. The only other testimony as far as I recall now that we will have, will be testimony relating to the defense of laches.

BY MR. WRIGHT: If the court please, might not it be understood that we make the same objection to each question having to do with the defense of laches and that we have an exception to the court's ruling in each instance so we may not need to interrupt the court each time to make the record in that respect.

THE COURT: I think that may be done.

MR. CLARK: That is satisfactory to the defendants, if your Honor please.

(Defendants' Exhibit G, consisting of the application of Thomas M. Crum for oil and gas prospecting permit, filed in the United States Land Office at Visalia, California, on January 24, 1921, was offered and received in evidence.) Defendants' Exhibit G is in words and figures as follows:

F.

(Pencil note: W. L. F.)
(Rubber Stamp:
Fees $32
Comm. (Orig). $.....
Excess $.....
Comm. (Fin.) $.....
Pur. Mon. $.....
Test Fees $.....
Interest $.....).)
(Pencil note in margin:
Box 667).
(Pencil note at bottom of
page:
Posted in 101 Apr. 1, 1921,)
—
106
G. H. Gray, Div. "O".
----------)

(Pencil: G-239a).
(Rubber Stamp:
Received
U. S. Land Office
Visalia, Calif.
Date: Jan. 24, 1921
Hour: 10:40 A. M.

09551
2468988

IN THE UNITED STATES LAND OFFICE.
VISALIA, CALIFORNIA

---o0o---

In the matter of the application of THOMAS M. CRUM for a PROSPECTING PERMIT under the provisions of the Act approved February 25, 1920. (Public No. 146 – 66th Cong.) : APPLICATION.

---o0o---

TO THE HONORABLE CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE AT WASHINGTON, D. C.:—

The application of THOMAS M. CRUM for a prospecting permit under the provisions of the above entitled Act respectfully represents as follows:—

a) Applicant's name is Thomas M. Crum; Post Office address: Box 667, Coalinga, Fresno County, California.

b) Affidavit showing citizenship of applicant is annexed hereto.

c) Applicant is not the holder of any other permit granted under the provisions of this Act, nor is he directly or indirectly interested in an application for such a permit.

d) The following is a description of the lands for which the permit hereby applied for is desired, to-wit:—

The NW¼ and the S½ of Section	18	(470.52 ac.)
All of section	20	(640 ")
All of section	28	(640 ")
All of section	30	(646.06 ")
the NE¼ of section	32	(160 ")
a total of		2556.58 acres

all within township twenty-one (21) South, Range seventeen (17) East, M. D. B. & Meridian.

e) None of the above described lands are situated within a known geological structure of a producing oil-field, but the reason why applicant believes the said lands to be a favorable field for prospecting is that the exposed formations indicate the geological structures to be similar to the formations found in the so-called East-side Coalinga field. That all of the said lands are near the apex of what is believed to be an extension of the anticline originating in the said Coalinga East-side field. That the lands embraced in this application are in as nearly compact form as is possible, the intervening sections having been patented.

f) Applicant wishes to name the following parties as references:—The First National Bank of Coalinga, California; Thos. P. Smith of Coalinga, California; Eli B. May of Coalinga, California.

Applicant states that although he is not at present actually engaged in the Oil business, he has at various times been interested in Companies actively engaged in the drilling for oil; that, if a permit be granted him, he will conduct the exploratory operations in accordance with approved methods and with the aid of experienced men, by going to the bottom of the formation in which oil or gas may be encountered with a standard drilling rig. That all drilling operation will be conducted in accordance with the rules and regulations ordered by the State Mining Bureau.

g) Applicant is not claiming a preferential right, but that a careful examination of the said lands showed no evidence of anyone else claiming such rights. That the said lands are not now occupied by anyone claiming any mineral rights, but that part of the land is occupied by settlers having homestead entries claiming surface rights only.

h) That applicant is ready to furnish a bond or bonds to such amount as may be required of him by the Department.

Respectfully submitted,

(Signed) Thomas M. Crum

STATE OF CALIFORNIA)
) ss.
COUNTY OF TULARE)

THOMAS M. CRUM, being first duly sworn, deposes and says, that he is the applicant named in the foregoing application for a permit, that he has read the foregoing application and knows the contents of same, that the statements made therein are true and correct to the best of his knowledge.

(Signed) Thomas M. Crum

Subscribed and sworn to before me this 24th day of January, 1921.

(Signed) Joseph Allen
Receiver.

09551

IN THE UNITED STATES LAND OFFICE
VISALIA, CALIFORNIA.

In the Matter of the Application of)
THOMAS M. CRUM) AFFIDAVIT
for a PROSPECTING PERMIT un-) of Proof of
der the provisions of the Act approved) Citizenship
February 25, 1920 (Public No. 146—)
66th Cong.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF TULARE)

Thomas M. Crum, who being first duly sworn deposes and says: That he is the same and identical person who made the Application for a Permit annexed hereto; that he was born July 6th, 1877 at Canton, Ohio; and that he has never renounced his allegiance to the United States Government.

(Signed) Thomas M. Crum

Subscribed and sworn to before me this 24th day of January, 1921.

(Signed) Joseph Allen
Receiver.

BY MR. CLARK: The above application of Thomas M. Crum for oil and gas prospecting permit was filed on January 24, 1921 in United States Land Office at Visalia. This application was under the Act of February 25, 1920 and pursuant to the regulations, Circular 672, Section 4. I understand there is no objection to that.

(Defendants' Exhibit H, consisting of authenticated copy of bond of Thomas M. Crum and the United States Fidelity and Guaranty Company for $2,000.00, dated May 9, 1921, filed in the United States Land Office at Visalia May 13, 1921 was offered and received in evidence.)

The bond provided, among other things, stating,

"that the permittee shall reimburse any entryman or owner of any portion of said land heretofore entered with the reservation of the oil and gas deposits to the United States made pursuant to the Act of July 17, 1914 (38 Stat. 507) for any damage to the crops or improvements of such entryman or owner resulting from drilling or other prospecting operations."

This form of bond is provided for by the regulations, Section 4, in the second paragraph, sub-paragraph (H).

MR. CLARK: It is the bond specified by the 1920 Act and is sufficient to answer the purposes of the 1914 law.

MR. WRIGHT: Therefore, you contend that that is enough bond for all purposes?

MR. CLARK: Yes.

MR. WRIGHT: To comply with the 1920 Act and the 1914 Act?

MR. CLARK: Until such time as further necessity to give bond in litigation or anything of that kind under the 1914 Act arises.

(Defendants' Exhibit I, consisting of an authenticated copy of an oil and gas prospecting permit, Visalia, Serial No. 09551, dated May 28, 1921, was offered and received in evidence. (Said Exhibit is in words and figures as follows:)

(Pencil note: G-207a).

4-208a

OIL AND GAS PROSPECTING PERMIT

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
U. S. Land Office at Visalia,

Serial No. 09551 California.

(Pencil note in margin:
Assignment to Frank Kennedy,
11/5/24 Noted in "O" G. H. G.
Approved Oct. 21, 1924.)

(Stamped at bottom:
Posted in 101 June 7, 1921,
—
106 G. H. Gray "O")

KNOW ALL MEN BY THESE PRESENTS, That the Secretary of the Interior, under and by virtue of the act of Congress entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the

public domain", approved February 25, 1920, has granted and does hereby grant a permit under Sec. 13 to Thomas M. Crum, granting him the exclusive right for two years from the date hereof to prospect for oil or gas, but for no other purpose, the following-described lands: S½ and NW¼ Sec. 18, all Secs. 20, 28, 30 and NE¼ Sec. 32, T. 21 S., R. 17 E., M. D. M., 2556.58 acres, upon the express conditions following:

1. To mark each of the corners of the claim within ninety days from date hereof with substantial monuments so that the boundaries can be readily traced on the ground, and post in a conspicuous place, upon the lands covered hereby, a notice that such a permit has been granted, and a description of the lands covered by this permit.

2. Within six months from date hereof to install upon some portion of the lands a substantial and adequate drilling outfit and to commence actual drilling operations.

3. Within one year from date hereof to drill one or more wells, not less than 6 inches in diameter, to a depth of at least 500 feet each, unless valuable deposits of oil or gas shall be sooner discovered.

4. Within two years from date hereof to drill one or more wells to a depth of at least 2,000 feet, unless valuable deposits of oil or gas shall be sooner discovered.

5. Not to drill any well within 200 feet of any of the outer boundaries of the lands covered by this permit unless the adjoining lands have been patented or the title thereto otherwise vested in private owners.

6. To carry on all operations hereunder in accordance with approved methods and practice; to use all reasonable

precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by permittee to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, and to carry out, at the expense of the permittee, all reasonable orders of the Secretary of the Interior relative to prevention of waste and preservation of property, and to comply with such regulations as may be issued by the Secretary of the Interior as to methods of operation.

7. To furnish and maintain during the period of this permit a bond with a qualified corporate surety, in the sum of $2,000, or such other amount as the Secretary of the Interior may at any time require: (a) Against the failure of the permittee to repair promptly, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation, and (b) To reimburse any entryman or owner of any portion of said lands heretofore entered with a reservation of the oil and gas deposits to the United States made pursuant to the act of July 17, 1914 (38 Stat., 509), for any damage to crops and improvements of such entryman or owner resulting from drilling or other prospecting operations.

8. That this permit is granted upon the express condition that the right is reserved to the Secretary of the Interior to permit upon such terms as he may determine to be just for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands covered hereby, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in the act under which this permit is granted.

9. The granting of this permit shall not preclude the allowance of entry, location or selection of any of the

lands included therein, where such entry, selection or location is made with a reservation of the mineral deposits to the United States.

10. This permit is granted on the express condition that if any of the land covered thereby is embraced in a forest, reclamation, power, or other withdrawal, or is segregated for any particular purpose, operations under this permit shall be so conducted as not to interfere with the administration and use of the land for the purpose for which withdrawn or segregated to a greater extent than may be determined by the Secretary of the Interior to be necessary for the most beneficial use of the land.

11. That until this permittee shall apply for a lease to one-quarter or more of the area included herein, he shall pay to the United States 20 per cent of the gross value of all oil or gas secured by him from the lands and sold or otherwise disposed of, or held by him for sale or other disposition.

12. The Secretary of the Interior reserves the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions enumerated herein or to exercise due diligence in the work of development.

Valid rights existing at the date of this permit will not be affected hereby. Dated this 28 day of May, 1921.

(Signed) E. C. FINNEY,
First Assistant Secretary of the Interior.
McD.

MR. CLARK: The land included in the above permit embraces the S½ and the NW¼ of Section 18, all of Sections 20, 28 and 30, and the NE¼ of Section 32, Township 21 South, Range 17 E. M. D. M. amounting to 2556.58 acres. Crum got the maximum acreage which was permissible under the law at that time in his permit and the permit in terms describing Section 30 of this township and range among other lands, is the one offered and received in evidence.

(Defendants' Exhibit J, consisting of an authenticated copy of assignment by Thomas M. Crum to Frank Kennedy of prospecting permit, Visalia No. 09551, dated July 24, 1924 was offered and received in evidence.)

The above document is an assignment of the permit which is received in evidence, dated July 24, 1924, filed for approval in the United States Land Office at Visalia July 28, 1924. It bears the approval of Secretary Work, dated October 21, 1924. This covers all of the lands involved in permit Visalia 09551.

(Defendants' Exhibit K, consisting of an authenticated copy of bond of Frank Kennedy and the Union Indemnity Company, dated July 30, 1924 for $2000.00, filed in the United States Land Office at Visalia on August 1, 1924, was offered and received in evidence.)

The above bond was conditioned upon compliance with all conditions of oil and gas prospecting permit, Visalia 09551. Paragraph 7 of that permit specified that the permittee "shall furnish and maintain, during the period of this permit, a bond with qualified corporation; security in the sum of $2,000.00 or such other amount as the Secretary of the Interior may at that time require; to

reimburse any entryman or owner of any portion of said lands heretofore entered with a reservation of the oil and gas deposits to the United States made pursuant to Act of July 17, 1914 (38 Stat. 509) for any damage to crops and improvements of such entryman or owner, resulting from drilling or other prospecting operations."

(Defendants' Exhibit L, consisting of a certified copy of letter dated October 20, 1924 from George R. Wickham, Acting Commissioner of U. S. Land Office, to Secretary of the Interior, was offered and received in evidence.)

The above letter is addressed to the Secretary of the Interior. Mr. Wickham recommends the approval of the assignment of permit, Visalia 09551, dated July 28, 1924 from Thomas M. Crum to Frank Kennedy. This bears the approval of Hubert Work, Secretary of the Interior, dated October 21, 1924.

(Defendants' Exhibit M, consisting of certified copy of letter dated October 28, 1924 from the Commissioner of the General Land Office to the Register and Receiver of the United States Land Office at Visalia, California, was offered and received in evidence.)

The contents of the above letter is the approval of the assignment of July 28, 1924 from Thomas M. Crum to Frank Kennedy of oil and gas prospecting permit, Visalia 09551.

(Defendants' Exhibit N, consisting of a certified copy of assignment of oil and gas prospecting permit, Visalia 09551, dated January 6, 1927 from Frank Kennedy to Kettleman Oil Corporation, was offered and received in evidence.)

The above is an assignment of that permit, Visalia 09551 in its entirety and bears the approval of the First Assistant Secretary of the Interior, dated March 26, 1927.

(Defendants' Exhibit O, consisting of a certified copy of an operating and drilling agreement between defendant Kettleman Oil Corporation and Milham Exploration Company, dated January 7, 1927 was offered and received in evidence.)

The above document provides for the conveyance by Kettleman Oil Corporation to Milham Exploration Company of the north half of the southwest quarter of Section 22, Township 21 south, Range 17 east, and the assignment of an oil and gas lease, dated December 30, 1926, between Marland Oil Company of California, as lessor, and Kettleman Oil Corporation as lessee, covering the south half of the northwest quarter of Section 1, Township 22 south, Range 17 east; also for the assignment of oil and gas prospecting permit Visalia 09131, covering the southeast quarter of Section 2, and the north half of the northeast quarter of Section 12, Township 22 south, Range 17 east, and the south half of the northeast quarter of Section 18, Township 22 south, Range 18 east; for the assignment of oil and gas prospecting permit Visalia 09551, covering the south half and the northwest quarter of Section 18, and the west half and the southeast quarter of Section 20, the south half of Section 28, the south half of Section 20, and the south half of the northeast quarter of Section 32, all in Township 21 south, Range 17 east. That is inclusive of the lands here involved, except Section 30. It also provides for the assignment of oil and gas prospecting permit, Visalia 010337, covering the southwest quarter of the northwest quarter, and the

south half of the southwest quarter, and the south half of the southeast quarter, the northeast quarter of the southeast quarter, of Section 14, Township 22 south, Range 17 east, and the east half of the northeast quarter, and the southeast quarter, and the east half of the southwest quarter, of Section 34, Township 21 south, Range 17 east. In consideration of the foregoing conveyances mentioned, the Milham Exploration Company agreed, by that operating and drilling agreement, to drill a test well to a depth of not less than 6000 feet on the southeast quarter of Section 2, Township 22 south, Range 17 east. The Kettleman Oil Corporation agreed to pay Milham Exploration Company $50,000 when the test well had been drilled to a depth of 5000 feet.

THE CLERK: Defendants' Exhibit O.

MR. WRIGHT: If the court please, I would like to ask Mr. Clark a question. Mr. Clark, was there included in that assignment any interest in the permit in so far as it affected the north half of Section 30, 21-17?

MR. CLARK: As far as I know, there was not, to answer your question literally.

MR. WRIGHT: Then I object, if your Honor please, to this document as incompetent, irrelevant and immaterial. It is an attempt to show an assignment of a partial interest in this permit and also in some other permits in which we are not concerned. It also shows the payment of some money and the development of property which is not involved in this action. I presume it is offered on the defense of laches. We make the objection on the further ground that the defense of laches is not available for the reasons that have been heretofore announced in court.

THE COURT: Objection overruled. (Exception noted.)

(Defendants' Exhibit P, consisting of a certified copy of an assignment dated March 7, 1927 of oil and gas prospecting permit Visalia 09551 in part, by the Kettleman Oil Corporation to the Milham Exploration Company, was offered and received in evidence.)

The above instrument assigns to the Milham Exploration Company oil and gas prospecting permit Visalia 09551, insofar as that permit covers the S½ and the NW¼ of Section 18, the W½ and the SE¼ of Section 20, the S½ of Section 28, the south half of Section 30 and the S½ and the NE¼ of Section 32, all in Township 21 South, Range 17 East. The assignment bears the approval of the First Assistant Secretary of the Interior, Judge Finney, dated March 26, 1927. The above assignment mentions the S½ of Section 30 but not the N½ of Section 30, which is the land in respect to which plaintiff claims a preference right to a permit in this action.

MR. WRIGHT: If the court please, the S½ of Section 30 is owned by Jean Bourdieu under a stock raising homestead under the 1916 law and he makes no claim of any kind under the 1916 entry, nor do we at this time assert any claim to it. Quite the contrary. He has been advised that he has no preference right on the S½ of that Section 30; and it is in the same category as any other lands in that permit would be, it not being the North ½ involved in this action.

THE COURT: The disclaimer will be noted and the same ruling will be made as has heretofore been announced with the same reservation. Objection overruled. (Exception noted.)

(Defendants' Exhibit Q consisting of a certified copy of extension certificate of bond, dated March 8, 1927, executed by the Union Indemnity Company, was offered and received in evidence.)

The above document extends the bond of July 30, 1924 to obligations assumed by the Kettleman Oil Corporation and the Milham Exploration Company under assignments of oil and gas prospecting permit, Visalia 09551, the one which is involved in part in this action.

(Defendants' Exhibit R, consisting of certified copy of letter dated March 24, 1927 from the Commissioner of the General Land Office to the Secretary of the Interior, was offered and received in evidence.)

The above document recommends the approval of assignments of the above prospecting permit from Frank Kennedy to the Kettleman Oil Corporation dated January 6, 1927, in its entirety and an assignment dated March 7, 1927 from the defendant Kettleman Oil Corporation to the Milham Exploration Company of oil and gas prospecting permit Visalia 09551, insofar as it covers the S½ and the NW¼ of Section 18, the W½ and the SE¼ of Section 20, the S½ of Section 28 and the S½ of Section 30, the S½ of the NE¼ of Section 32, all in Township 21 S. Range 17 E.

(Defendants' Exhibit S, consisting of a certified copy of letter dated March 31, 1927 from William Spry, Commissioner of the General Land Office, to the Register of the U. S. Land Office at Visalia was offered and received in evidence.)

The above document approves assignments of oil and gas prospecting permit, Visalia 09551 from Frank Ken-

nedy to Kettleman Oil Corporation in its entirety, and from the Kettleman Oil Corporation to the Milham Exploration Company in part. That is the part already indicated here, the area.

(Defendants' Exhibit T consisting of an authenticated copy of agreement dated March 9, 1929 by and between Kettleman Oil Corporation and Pacific Western Oil Company, both defendants in this action, was offered and received in evidence.)

In the above document, the Kettleman Oil Corporation agrees to convey to the Pacific Western Oil Company, an undivided one-half interest in and to all property owned by the Kettleman Oil Corporation in the Kettleman Hills. The properties are described in Paragraph 1, 2, 3, 4 and 5, pages 1 to 4, inclusive, of the Exhibit. The Pacific Western Oil Company agrees to pay $1,000,000. upon the execution of the agreement and an additional sum of $750,000. out of 10% of the first oil, gas, gasoline and other hydro-carbon substances produced from the property, and to drill three wells upon the property, at its sole cost and expense. The agreement further provides for the joint operation of the properties by the Kettleman Oil Corporation and the Pacific Western Oil Company.

(Defendants' Exhibit U, consisting of a cancelled check, number 1376 for $1,000,000.00 from the Pacific Western Oil Company to Kettleman Oil Corporation, was offered and received in evidence.)

The check shows payment, and bears the necessary and proper indorsements. It is drawn on the Merchant's National Trust and Savings Bank, Los Angeles, California.

(Defendants' Exhibit V, consisting of certified copy of assignment of an undivided one-half interest in an oil and gas prospecting permit, Visalia 09551, by Kettleman Oil Corporation to Pacific Western Oil Company, dated March 8, 1929, was offered and received in evidence.)

The above assignment covers the NE¼ of Section 20, the N½ of Section 28, the N½ of Section 30, the N½ of the NE¼ of Section 32, Township 21 S. Range 17 E.

The above assignment actually conveyed an undivided one-half interest in the N½ of Section 30 on the faith of the title of the permit. The contents bear the approval of the Secretary of the Interior, Ray Lyman Wilbur, dated September 29, 1929. These approvals are necessary to the assingment.

(Defendants' Exhibit W, consisting of a certified copy of an extension certificate of bond issued by Union Indemnity Company, dated March 14, 1929, was offered and received in evidence.)

The above bond extension extends the bond dated July 30, 1924 to the obligations assumed by the Pacific Western Oil Company under assignment from Kettleman Oil Corporation, of an undivided one-half interest in oil and gas prospecting permit, Sacramento 019438, which was formerly Visalia No. 09551.

(Defendants' Exhibit X, consisting of certified copy of letter and decision of C. C. Moore, Commissioner of the General Land Office dated September 27, 1929 to the Secretary of the Interior, was offered and received in evidence.)

The above letter recommends the approval of an assignment dated March 8, 1929 from Kettleman Oil Corpora-

tion to Pacific Western Oil Company of an undivided one-half interest in and to oil and gas prospecting permit, Sacramento No. 019438, formerly Visalia No. 09551, insofar as said permit covers the following described lands, to-wit: NE¼ of Section 20, N½ of Section 28, N½ of Section 30, N½ of NE¼ of Section 32, Township 21 South, Range 17 East, and bears the concurrence of the Director of U. S. Geological Survey and the approval dated September 28, 1929 of Ray Lyman Wilbur, Secretary of the Interior.

(Defendants' Exhibit Y, consisting of Certified copy of letter dated December 30, 1929 from C. C. Moore to Register U. S. Land Office, Sacramento, California, was offered and received in evidence.)

The above letter approves the assignment dated March 8, 1929 by the Kettleman Oil Corporation to the Pacific Western Oil Company of an undivided one-half interest in oil and gas prospecting permit Sacramento No. 019438, formerly Visalia No. 09551, insofar as that permit covers the NE¼ of Section 20, N½ of Section 28, N½ of Section 30, N½ of NE¼ of Section 32, Township 21 S. Range 17 East.

(Defendants' Exhibit Z, consisting of certified copy of joint application for leases in due form dated October 2, 1929, by Kettleman Oil Corporation, Milham Exploration Company and Pacific Western Oil Company, filed in the United States Land Office on October 4, 1929, was offered and received in evidence.)

The above documents shows application jointly for leases as a reward for discovery upon lands described in oil and gas prospecting permit Sacramento No. 019438, formerly Visalia No. 09551.

MR. WRIGHT: Where does that show the discovery was made, Mr. Clark?

MR. CLARK: I do not recall.

MR. WRIGHT: I would like to call your Honor's attention to this last Exhibit Z, to the fact that it shows that the discovery was made on Section 28, 21-17, and that in the application for leases, the lands involved in this action are to be covered by the non-preferential feature of the leases. That is non-preferential in respect to royalty to be paid to the United States.

(Defendants' Exhibit No. 2-A, consisting of authenticated copy of lease, Sacramento No. 019438-A, United States of America, lessor, to Milham Exploration Company, lessee, dated October 4, 1929, was offered and received in evidence.)

The above lease was made to the Milham Exploration Company and covered the S½ of Section 28, Township 21 S. Range 17 E.

(Defendants' Exhibit 2-B, consisting of authenticated copy of lease, Sacramento 019438-B, from the United States of America, lessor, to the Milham Exploration Company, lessee, dated October 4, 1929 was offered and received in evidence.)

The above document leases a fractional W½ of the W½, the E½ of the W½, and SE¼ of Section 18, the W½ and the SE ¼ of Section 20, Lots 3 and 4, and the E½ of the SW¼, and the SE¼ of Section 30, and the S½ of the NE¼ of Section 32, Township 21 South, Range 17 E.

(Defendants' Exhibit 2-C, consisting of authenticated copy of lease, Sacramento No. 019438-C, dated October 4. 1929, from the United States of America, lessor, to Kettleman Oil Corporation and Pacific Western Oil Company, lessees, was offered and received in evidence.)

The above lease covers the N½ of Section 28, Township 21 South, Range 17 East.

(Defendants' Exhibit 2-D, consisting of authenticated copy of lease, Sacramento No. 019438-D, executed October 4, 1929 by United States of America, lessor, to Kettleman Oil Corporation and Pacific Western Oil Company, lessee, was offered and received in evidence.) (A copy of said lease, Defendants' Exhibit 2-D, is included as a part of the findings of fact herein.)

The above document leases the NE¼ of Section 20, Lots 1 and 2, and the E½ of the NW¼ and the NE¼ of Section 30, and the N½ of the NE¼ of Section 32, Township 21 South, Range 17 E, being a portion of lands described in the oil and gas prospecting permit, Sacramento No. 019438, formerly Visalia No. 09551.

MR. CLARK: I call your Honor's attention to the first page of that lease, in which there is an unusual insertion. I will read, beginning with the first paragraph, as follows: "This indenture of lease, entered into, in triplicate, as of the 4th day of October, 1929, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and Kettleman Oil Corporation and Pacific Western Oil Company, Delaware corporations, party of the second part, hereinafter called the lessee, reference being made to an agreement dated

July 25, 1929, to be considered in connection herewith, accepted and approved by the Department of the Interior on July 25, 1929, being a covenant with and by and between this lessee and certain other permittees and/or lessees and the Secretary of the Interior, said agreement regulating, controlling and governing the development and production of the North Dome, Kettleman Hills Oil and Gas Field, California."

(Defendants' Exhibit 2-E, consisting of an authenticated copy of agreement dated Los Angeles, California, July 25, 1929, commonly known as Suspension Agreement, was offered and received in evidence.)

The above agreement provided for restricted operations in the Kettleman Hills pending the consummation of a proposed unit development program. All owners and holders of prospecting permits and leases and most of the owners of fee lands in the North Dome of Kettleman Hills became parties to this agreement.

(Defendants' Exhibit 2-F, consisting of authenticated copy of statutory lessee's bond of the National Surety Company and the Milham Exploration Company dated October 7, 1929, was offered and received in evidence.)

The above bond was in the principal sum of $5,000.00, covering performance of the terms and conditions of the lease, Sacramento No. 019438-B.

(Defendants' Exhibit 2-G, consisting of authenticated copy of lessee's bond dated December 5, 1929, executed by the National Surety Company, the Kettleman Oil Corporation and Pacific Western Oil Company, was offered and received in evidence.)

The above bond is the statutory lessee's bond covering performance of oil and gas lease, Sacramento No. 019438-C.

(Defendants' Exhibit 2-H, consisting of authenticated copy of lessee's bond dated December 5, 1929, executed by National Surety Company, Kettleman Oil Corporation and Pacific Western Oil Company, was offered and received in evidence.)

The above exhibit is another statutory lessee's bond covering the performance of oil and gas lease, Sacramento No. 019438-D. (By "Statutory Lessee's Bond" is meant the bond required by the Leasing Act.

(Defendants' Exhibit 2-I, consisting of authenticated copy of an agreement dated January 31, 1931 between Kettleman North Dome Association and Kettleman Oil Corporation, Ltd., was offered and received in evidence.)

The Pacific Western Oil Company executed a counterpart of this agreement.

Defendants Exhibit No. 2-I is the so-called "Kettleman Unit Plan Agreement." It provides for the operation of all lands of the parties to it by the Kettleman North Dome Association for the common benefit of all the parties and pursuant to the terms of this agreement, the twenty year term of the oil and gas leases held by the parties thereto were extended for the life of production from the field. It bears the certification, determination and approval of Ray Lyman Wilbur, Secretary of the Interior.

Many other producers executed this agreement in counterpart.

MR. WRIGHT: If the court please, there should be a map attached to this exhibit. I would like to have it attached before this is accepted in evidence. The contents of the instrument refers to the map and it is of importance.

MR. CLARK: It is understood, if your Honor please, that we will procure a map like that which was attached here according to counsel's statement to me, and check it and agree upon it and attach it to this exhibit.

THE COURT: That may be done later.

(Defendants' Exhibit 2-J, consisting of certified copy of report of Secretary of the Interior, was offered and received in evidence.)

The above Exhibit 2-J is an exemplified, certified copy of the report of the Secretary of the Interior, pursuant to the requirements of the Pickett Act of June 25, 1910, made in 1911, reporting the withdrawals made under the Pickett Act. On page 4, under the heading, "Petroleum Withdrawals," appears the following: "Date of Recommendation, December 28, 1910; Approved by President, December 30, 1910; State, California; number of withdrawal – 16, acreage 18,480. That appears under the caption of "Petroleum Withdrawals." This is offered in evidence as an executive interpretation of the withdrawal order of December 30, 1910. (This Exhibit so far as it affects the case at bar is in words and figures as follows:)

62D CONGRESS) HOUSE OF REP- (DOCUMENT
2d Session.) RESENTATIVES. (No. 317.

LANDS WITHDRAWN FROM SETTLEMENT

LETTER

from

THE SECRETARY OF THE INTERIOR,

Submitting

A Report of Lands Withdrawn From Settlement Under Act of June 25, 1910.

December 16, 1911.—Referred to the Committee on the Public Lands and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, December 8, 1911.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: In compliance with the provisions of the act approved June 25, 1910 (36 Stat., 847), I have the honor to submit the accompanying report on lands withdrawn from settlement, location, sale, or entry under the provisions of said act.

Very respectfully,

WALTER L. FISHER, Secretary.

Land withdrawn by authority of the act of June 25, 1910 (36 Stat., 847).

COAL.

States.	No. of withdrawal	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands withdrawn, with data concerning withdrawals as indicated by column headings shown above).

PETROLEUM.

State	No. of withdrawal	Date of recommendation.	Approved by President	Acreage
California	15	Nov. 10, 1910	Nov. 25, 1910	5760
Do	16	Dec. 28, 1910	Dec. 30, 1910	18480

Do	18	Jan. 23, 1911	Jan. 26, 1911	242158
Do	20	Feb. 23, 1911	Feb. 24, 1911	3943
Do	21	Do	Do	33932
Do	23	Sept. 9, 1911	Sept. 14, 1911	14719
Wyoming (3)	17	Jan. 21, 1911	Jan. 26, 1911	6718
Wyoming (4)	19	Jan. 27, 1911	Jan. 30, 1911	143280
Wyoming (5)	22	June 13, 1911	June 14, 1911	170333

PHOSPHATE.

States	No. of withdrawal	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands withdrawn, with data concerning withdrawals as indicated by column headings shown above).

States	No. of withdrawal	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands withdrawn, with data concerning withdrawals as indicated by column headings shown above).

In addition to the withdrawals listed, 238,082 acres classified as coal in the Fort Berthold Indian Reservation, N. Dak., were withdrawn by order of June 27, 1911.

Although not called for in the act of Congress above mentioned, nevertheless there is given a list of the restorations under the said act of June 25, 1910:

Lands restored to entry.

COAL

States	No. of restoration	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands restored, with data concerning restorations as indicated by column headings shown above).

PETROLEUM.

States	No. of restoration	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands restored, with data concerning restorations as indicated by column headings shown above).

PHOSPHATE.

States	No. of restoration	Date of recommendation.	Approved by President	Acreage

(Here follows list of lands restored, with data concerning restorations as indicated by column headings shown above).

POWER SITES.

(Here follows list of lands restored, with data concerning restorations as indicated by column headings shown above).

MR. CLARK: If your Honor please, on the matter of expenditures upon the faith and integrity of the title here it has been stipulated that the following are facts as I understand the stipulation.

MR. WRIGHT: Your Honor, I do not want to so stipulate because I object, or make the same objection to all of this line of evidence, as to its materiality and particularly as to it being a defense on the ground of laches. We contend they have no such defense, as we have heretofore argued. So I want to make the same objection to this line of evidence. However, I am perfectly willing that Mr. Clark indicate the figures which these companies have expended and on his statement that they are the correct figures they can be accepted by the court as such subject to our objection, of course.

THE COURT: I think I understand it. You are not disputing but what Mr. Clark will correctly state the figures that he intends to state but you consider that the entire matter is irrelevant and immaterial.

MR. CLARK: May it be understood that the statement I shall make concerning these expenditures shall be deemed to be a fact, subject, of course, to all legal objections except the objection that it didn't come from a witness on the stand? Is that correct?

MR. WRIGHT: That is correct.

MR. CLARK: First, Kettleman Oil Corporation paid to Frank Kennedy, on January 7, 1927, the sum of $36,000 for oil and gas prospecting permit Visalia No. 09551, the so-called Crum permit.

Second, Pacific Western Oil Company, one of the defendants here, paid out moneys as follows: $1,000,000 to Kettleman Oil Corporation on March 9, 1929. We have already proved that, of course. It assumed an ob-

lig: tion to pay $750,000 to Kettleman Oil Corporation out of the first 10 per cent of the proceeds from the production, on account of which $10,175.09 was paid prior to July 1, 1931, which was the date on which the suit here before your Honor was filed; and $331,968.59 additional was paid from July 1, 1931, to September 30, 1933, afterwards. It assumed an obligation to drill three free wells, that is, wells without cost to the Kettleman Oil Corporation. In addition, it drilled the well known as No. 428-J. That is a well on Section 28 in this permit. It was known formerly as Pacific Western Well No. 14.

MR. CLARK: And that the cost of that Well No. 428-J to March 31, 1931, was $27,311.83.

Third, by Milham Exploration Company, on Elliott Well No. 1, which is known as the Kettleman Hills discovery well, $50,000 was paid by Kettleman to Milham, and $4,000 additional at another time by Kettleman to Milham.

THE COURT: I have forgotten where that discovery well was.

MR. CLARK: That is down in Section 2, 22, I guess it is, down about here.

THE COURT: Yes. I remember now.

MR. CLARK: And, of course, there was a conveyance of property, as indicated by the contract. The total cost to completion of Milham Elliott No. 1, that well, was $326,667.09. And it produced 4100 barrels of oil per day of 59.02 gravity Baumé.

MR. CLARK: Milham-Kennedy Well No. 1, Section 28, known as 828-J, cost, to March 31, 1931, $204,703.13. That, if your Honor please, is money spent actually within the limits of this permit.

Milham No. 25, known as 2528-J, on Section 28 again—cost, to March 31, 1931, $47,168.78. Milham paid for facilities which were of use to all those drilling operations a total of $160,000 prior to the time of the filing of this suit, but only some of that $160,000 is properly attributable to any part of the activities within the permit. Just what that amount is we haven't been able to ascertain, and I submit that proof to your Honor in that condition.

The Kettleman North Dome Association spent on well No. 428-J, from April 1, 1931, to June 30, 1931, $71,-863.75, and from July 1, 1931, that is to say, after the filing of this suit, to November 4, 1931, $121,129.64, I think that is. That is on Section 28. The well produced 11,113 Barrels a day of 36 gravity Baumé oil.

On well No. 828-J, the Kettleman North Dome Association expended, from April 1, 1931, to June 30, 1931, $116,189.67. From July 1, 1931, to December 31, 1932, it spent $8,752.92. That well came in 7,445 barrels per day of 36.8 Baumé oil.

On well 2528-J, again in Section 28, the Association expended, from April 1, 1931, to June 30, 1931, $71,-833.61, and from July 1, 1931 to December 31, 1932, $126,649.41. That well produced at the rate of 6,241 barrels of oil per day, of 37.3 Baumé.

On the well known as 8330-J the Association expended, from May 11, 1933, to September 30, 1933, $141,807, and I think that is 22 cents. The well produced daily 4,932 barrels of 36 Baume oil.

MR. CLARK: Expenditures by the Pacific Western and Kettleman jointly:

Assessments paid to the Kettleman North Dome Association on the Crum permit area, exclusive of payments made by Milham Exploration Company on the area con-

veyed to the Milham Exploration Company, the conveyance being in evidence, to June 30, 1931, $742,071.91. Included in that total sum of $742,071.91 there were assessments paid to the Association on the north half of Section 30, Township 21 south, Range 17 east, to June 30, 1931, $276,119.78.

Assessments paid to the Association on the Crum permit, that is, on the area within the Crum permit, exclusive of payments by Milham on the area conveyed to it, from July 1, 1931, to September 30, 1933, that is, since the institution of the suit, $432,427.01.

Assessments paid to the Association on the north half of Section 30, Township 21 south, Range 17 east, from July 1, 1931, to September 30, 1933, $164,241.24, that figure being included, of course, your Honor, in the total figure of $432,427.01, it being a segregation of the amount actually paid as assessments on the north half of Section 30.

Receipts from the sale and production of oil, including payments of the Association for equipment for and on account of the Crum permit area, exclusive of payments by the Association to Milham on the area conveyed to Milham, to June 30, 1931, totaled $60,647.34.

Receipts from the sale of production for and on account of the North half of Section 30, Township 21 south, Range 17 east, the area involved in the litigation here, to June 30, 1931, amounted to $22,216.02.

MR. CLARK: Receipts from the sale and production for and on account of the Crum permit, the whole area, exclusive of payments by the Association to the Milham Exploration Company, from July 1, 1931, to September 30, 1933, $1,965,909.53.

Receipts from the sale of production for and on account of the north half of Section 30, Township 21 south, Range 17 east, from July 1, 1931, to September 30, 1933, $747,465.56.

MR. WRIGHT: If your Honor please, before we proceed any further, I would like to ask for a stipulation such as Mr. Clark requested of us, to the effect that we may be deemed to have moved to strike each and every answer to which we have made objection, and which objection has been overruled, without going through the entire record and making each motion separately, in order to save time. Is that agreeable, Mr. Clark?

MR. CLARK: Not only that, your Honor,—of course that is agreeable to us.

THE COURT: I think, as far as the court is concerned, it has covered the record as it desires it. I don't know whether the litigants have or not; the court has. There is only one matter that I should state for the record now, that as far as the court is concerned, if there be any modification of the rulings that have been announced, either definitely or tentatively, the party against whom the ruling is modified may have an exception to the ruling without any further statement of exception.

MR. WRIGHT: In other words, as I understand, your Honor, neither side is prejudiced, and when the matter is finally up for determination any rulings that are made against either party are excepted to, and we are all protected upon our record on appeal. That is as I understand it.

THE COURT: Yes.

MR. WRIGHT: I will call Mr. Arnold, if the court please.

(Testimony of Ralph Arnold)

RALPH ARNOLD

DIRECT EXAMINATION BY MR. WRIGHT

was called as a witness on behalf of plaintiff, in rebuttal. Having been previously sworn, he testified as follows:

I have before me a map introduced by Defendants, attached as Exhibit A to Defendants' Exhibit 2-I dated October 15, 1930 which I recognize to be a map showing the classification of lands in the Kettleman Hills North Dome, into two elements, one being the absolute proven productive land and the other the possible land along the edge of the proven area. Within the red line is the proven area and within the blue lines is the possible territory that extends around the edge of the red I think the map was prepared in 1930, about October 15th of that year, about the time of the filing of the North Dome Association contract. I think it was perhaps by a joint committee representing the companies. They had all of the geologic data that it was possible to get from the various companies.

Q. Do you know what data they had before them when they prepared that map?

MR. CLARK: Still, your Honor, it is improper rebuttal. Does your Honor care to hear my reason why?

THE COURT: Yes.

MR. CLARK: The reason is simply this: We never offered Mr. Ball to show that these lands were valuable for oil and he didn't so testify. The record will bear me

(Testimony of Ralph Arnold)

out in that statement. We offered Mr. Ball to show what action the Land Classification Board had taken and he testified to the same effect as the minutes would have proved had they been procurable to produce before your Honor. What Mr. Ball did say in response to a question from Mr. Wright himself was that upon the geological data available at that time and before the Land Classification Board they had reason to believe that the lands should be classified as mineral. And he further went on to say that nobody could tell that land was known to be petroleum land until you had actually produced petroleum from it, and that was in response to a question by counsel.

THE COURT: I think that is what it is. I think the question pending is objectionable. Objection sustained.

(Witness Resumes) I have compared the map marked Defendants' Exhibit B and have compared the boundary of the lands which Mr. Ball testified were withdrawn under the order of December 30, 1910, in order to see whether the lands covered by that order are within the red line or within the red boundary. Somewhere in the neighborhood of 6000 acres were subject to the order of December 30, 1910 which are not shown on this map within the red lines. They are not shown on the red lines nor in Defendants' Exhibit B.

Witness excused.

IT IS HEREBY STIPULATED by counsel that the United States Circuit Court of Appeals for the 9th Circuit and/or the Supreme Court of the United States may take judicial notice of all orders of withdrawal and official correspondence relating thereto as published in Bulletin #623 by the Department of the Interior and entitled "Petroleum Withdrawals and Restorations Affecting Public Domain," beginning at page 59 thereof to and including page 427.

IT IS FURTHER STIPULATED that counsel for any party may set out these orders, telegrams and/or letters or any of them in briefs or appendices thereto and may refer to any and/or all of said orders in argument.

IT IS FURTHER STIPULATED that Circular #672 of the General Land Office Department of the Interior, being "Regulations Concerning Oil and Gas Permits and Leases and Rights of Way for Oil and Gas Pipe Lines", but excluding from the affect of this stipulation the appendix to said Circular #672, may be noticed judicially by the said courts or either of them and all or any part of said Regulations may be set out in the briefs of counsel or appendices thereto and counsel may refer to all or any of said Regulations in argument.

IT IS HEREBY STIPULATED that the foregoing may be settled and allowed as the statement of the evidence.

Chandler, Wright & Ward,
By A. B. Dorman,
Solicitors for Appellant.

Felix F. Smith.
Pilsbury, Madison & Sutro,
Herbert W. Clark.

Morrison, Hohfeld, Foerster, Shuman
& Clark,

By Boice Gross

Solicitors for Defendants and Appellees, Kettleman Oil Corporation.

Herbert W. Clark
Morrison, Hohfeld, Foerster, Shuman
& Clark
by Boice Gross.

Solicitors for Defendants and Appellees, Pacific Western Oil Company.

W. J. Henry,
Orrick, Palmer and Dahlquist,
By Boice Gross,

Solicitors for defendant and appellee Franklin R. Kenney.

Brobeck, Phleger & Harrison,
By Boice Gross,
Solicitors for Frank Kennedy.

George W. Nilsson,

Solicitor for defendant and appellee Kettleman North Dome Association.

IT IS HEREBY ORDERED that the within and foregoing statement of the evidence be and the same is hereby settled, allowed and approved as appellant's statement of the evidence.

Dated this 27th day of February, 1935.

Paul J. McCormick,
DISTRICT JUDGE.

[Endorsed]: Lodged Feb 15 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

Filed Mar 9 1935 R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk

At a stated term, to wit: The April Term, A. D. 1934, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Monday, the 1st day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Jean Bourdieu,	Complainant,	)
		)
vs		) No. D-14-M-Eq.
		)
Pacific Western Oil Company, a corp., et al.,	Defendants.	)

All rulings made during the hearing of this suit on the merits are adhered to and unchanged. Exceptions allowed respective suitors on all adverse rulings.

Findings and decree ordered for defendants upon issues of Bill of Complaint and amendments thereto and answers of defendants with costs in accordance with written memorandum of decision filed herein this day. Exceptions allowed complainant. Solicitors for defendants will accordingly prepare, serve and present findings and decree in accordance with this order.

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF DECISION.

McCORMICK, District Judge.

This is a suit in equity whereby the complainant, Jean Bourdieu, seeks to impress a trust in his favor upon an oil and gas lease issued by the United States on October 4, 1929, to defendants, Kettleman Oil Corporation and Pacific Western Oil Company, a corporation, under the Leasing Act of February 25, 1920. (41 Stat. 437).

The lease grows out of a prospecting permit granted by the Government on May 28, 1921, under said Leasing Act to one Thomas M. Crum. Both the prospecting permit and the lease cover an area within which the land claimed by the complainant is situate. By transfers, assignments and by the production of oil in paying quantities from the area covered by the prospecting permit the two aforesaid corporations have succeeded to rights of the permittees and as above stated are the lessees named in the lease. The only portion of the leased area that is involved in this case is situate in Fresno County, California, and consists of 322.89 acres described as "Lots 1 and 2, E½ of the NW¼ of the NE¼ of Section 30, Township 21 south, Range 17 East, Mt. Diablo Meridian."

There is no claim of any fraud. There is no contention that at any time any fiduciary relationship existed between complainant and any of the defendants named in the Bill. It is admitted that Bourdieu has not at any time attempted to obtain from the United States an oil and gas prospecting permit or an oil and gas lease relating to the lands that he claims in this suit, and the complainant does not assert that any of the defendants fraudulently prevented

him from obtaining from the Government either a prospecting permit or an oil and gas lease on the premises that are involved herein.

It is contended by the complainant that the said two corporations hold the lease insofar as it covers the land here involved in trust for Bourdieu and that the defendants should be required in equity to transfer it to him because at the time the defendants acquired the lease from the United States the complainant had under Section 20 of said Leasing Act of February 25, 1920, the preferential and exclusive right to any oil and gas lease that could be issued upon the said area. Section 20 of the Leasing Act, as far as it relates to this case reads:

"In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry . . . . the entryman or patentee, or assigns . . . . if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease as herein provided in case of discovery. . ."

In order for the complainant to compel defendants to transfer their lease to him he must show, (1) that he in good faith entered the lands as agricultural lands under a belief that he would ultimately receive title to both the surface and mineral deposits of the lands entered and, (2) he must also prove that at the time of his entry the lands that he entered were not then withdrawn as mineral lands or not then classified as mineral lands.

I find that the lands claimed were at the time of Bourdieu's homestead entry both withdrawn from entry as being petroleum lands and classified as such and therefore that complainant has established no right in or to the

oil and gas lease in suit. It is undeniable that oil lands or petroleum lands are mineral lands within the meaning of laws relating to mineral lands and the acquisition of title therein. The term mineral being used and applied in a popular sense. Burke vs S. P. R. Co, 234 U. S. 677. I further find that although Bourdieu in good faith entered the lands as agricultural lands he did not do so under a belief that he would ultimately receive title to both the surface and the mineral deposits of the lands entered.

The complainant, Jean Bourdieu, is a sheep raiser. Since 1914 he has been grazing his flocks in Kettleman Hills, California, and upon and about the land in suit. On March 6, 1919, he filed application and made entry upon the above described land as a homestead under the Act of February 19, 1909. (35 Stat. 639). In his application Bourdieu asserted that the area was non-mineral and agricultural in character and stated that his homestead entry was "subject to provisions and reservations and limitations of Act of July 17, 1914." Thereafter and on October 7, 1925, a patent to said land was issued by the United States to Bourdieu. The patent recites that the grant is made subject to certain rights that are immaterial to the consideration of this case and "Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914, (38 Stat. 509)."

On December 30, 1910, upon the recommendations of the acting director of the Geological Survey and the acting Secretary of the Interior that were based upon information

received by those governmental officials from the field that indicated that certain lands in the public domain are valuable for oil, President Taft, pursuant to express authority of an Act of Congress dated June 25, 1910, and known as the Pickett Act, (36 Stat. 847), made and promulgated an executive mandate, which as far as it pertains to this controversy reads as follows:

"ORDER OF WITHDRAWAL.

Petroleum Reserve No. 16—California No. 7.

It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled 'An Act to authorize the President of the United States to make withdrawals of public lands in certain cases,' approved June 25, 1910:

Mt. Diablo Meridian, California.
T. 21 S., R. 17 E., Sec. 30, all;
Oil—California No. , p. 3.

The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres.

Wm. H. Taft
President."

It should be noted that under the terms of Section 1 of the Pickett Act, supra, all "withdrawals or reservations" of public lands by the President remained in force until revoked by him or by an Act of Congress.

There is no evidence before this court that at any time the Taft withdrawal order of December 30, 1910, as far as it relates to the area in suit, was ever revoked by the President and there was no Congressional legislation that affected the Pickett Act in any way that concerns this case until July 17, 1914, when "An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing oil, gas" and other non-metallic minerals became law. (38 Stat. 509).

It is clear from the wording of the Presidential order of December 30, 1910, that no entry under the non-mineral land laws, and no location under the mineral land laws could be validly made upon any of the withdrawn lands until a revocation by the Executive, or by the legislative department of the Government occurred, and when consideration is given to the undeniable situation that no change in the availability for entry of any of the withdrawn lands involved in this action occurred until the aforesaid Act of July 17, 1914, it follows that no right of any kind by any person whatever in the land described in the withdrawal order could exist or be established until what might be characterized as the Enabling Act of July 17, 1914, became effective. It is therefore solely upon such Act that any claim of a preferential right to an oil lease can be made by complainant to any part of said Section 30 that was withdrawn from any entry.

Before considering the restricted right of entry that the Act of July 17, 1914, created, it should be noted that

Section 30 in controversy here was actually not only wholly withdrawn and detached from the existing public domain by the Presidential edict of December 30, 1910, but I think it is clear that it was also classified as oil land by such withdrawal order. Unless we delete and expunge the words and expressions "Petroleum Reserve", "petroleum lands", "Oil", "Area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres" from the order, the document amounts to nothing less than a classification of all of the section of land in which the area in suit is located as oil land and withdraw such oil land from all entry or acquisition. It stamped the land as prima facie mineral in character. Utah vs. Lichliter, 50 L. D. 231. In interpreting an executive proclamation all words used should be considered and given ordinary and natural meaning. Mason vs. U. S., 260 U. S. 545.

The history of the times preceding and concurrent with the promulgation of the order of December 30, 1910, also establishes beyond doubt that the land involved in this controversy was classified as oil land by the Presidential action of that date. It is futile to argue since the passage of the Pickett Act that the President is without power to withdraw and classify lands in the public domain. Indeed the Supreme Court in the Midwest case, 236 U. S. 439, in no uncertain language sustained this Presidential power even without an express authorization from Congress.

Under the Act establishing the duties of the Executive Agency of the Geological Survey (20 Stat. 394) its functions include "the classification of the public lands and

examinations of the Geological structures, mineral resources, and products of the national domain."

A few days prior to the issuance of the December 30, 1910 order "The Land Classification Board, Oil Section of the Geological Survey" formally met and after considering evidence that had been recently obtained in the field which consisted partly of the drilling of deeper and new wells it was decided that Section 30 in suit with other areas should be classified as oil lands. This decision was contrary to an opinion that had been reached in 1907 from studies that had been made in the field at and prior to that time. It is clear from the record that President Taft in issuing the order of December 30, 1910, did so upon the aforesaid latest findings and classifications of the Department of the Interior that characterized the land in suit as oil land. I do not agree with plaintiff's contention that in order for land to be classified as oil land within the meaning of the laws of the United States that pertain to this suit, it must have a known character as oil land as of the date of the inquiry. I think that the Director of the Geological Survey in his letter of June 17, 1908, that was introduced by the plaintiff, correctly described the only requirements of classification as follows:

"In dealing with oil lands it must be borne in mind, however, that absolute determination, by work on the surface, of the occurrence or non occurrence of oil in any one locality is not possible. The best that can be done is to calculate the degree of probability on the basis of surface indications and structural conditions."

This test of classification appears to have been substantially the one sanctioned by the Supreme Court in West vs. Edward Rutledge Timber Co., 244 U. S. 98.

"Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasture (grazing), timber, arable, or mineral. It is determined by surface indications. Minerals may be hidden under any surface, but a surveyor is not expected to explore for them, that he may include or exclude reference to them in his reports."

There are other authoritative governmental acts that show that at the time Bourdieu entered the homestead on March 6, 1919, the lands claimed by him had been declared to be and classified as oil lands.

Under the Pickett Act it is made the duty of the Secretary of the Interior to report all Presidential withdrawals under such Act to Congress at the next regular session after the respective withdrawals. Pursuant thereto as shown by Document 317, House of Representatives, Sixty-second Congress, Second Session, and under date of December 8, 1911, said Secretary reported an area that included the Section 30 within which the Bourdieu homestead is located as having been withdrawn as petroleum lands. Here was a certification made to Congress by the officer whose statutory duty it was to report such matters that the land claimed by complainant was "petroleum" land that had been withdrawn from entry. Furthermore as part of Bulletin 623 of the United States Geological Survey, issued and distributed by the Government, there is a map annexed as Plate II; on the face of this map these words appear "Key map, State of California, showing location of oil land withdrawals outstanding on September 30, 1916", and in another place on the face of the map the following is printed "Department of the Interior, Franklin K. Lane, Secretary, U. S. Geological Survey, George Otis Smith, Director. Map showing Petroleum Withdrawals outstanding on September 30, 1916.

in the State of California. Base Map enlarged from General Land Office Base Edition of 1907." The area involved in this suit is within the oil land withdrawals shown and described on this map. I am satisfied that under the case of West vs. Rutledge Timber Co. (supra), this action of the Geological Survey constitutes classification of the lands claimed by Bourdieu as "Mineral". It thus appears that with no later change whatever in the status or classification of the land involved in this suit Bourdieu filed his entry on such land as an agricultural homestead on March 6, 1919. Because of the indisputable fact that the complainant Bourdieu filed his homestead entry subsequent to the withdrawal and classification of the lands entered as oil lands and in the entry and patent it is expressly stated that each is restricted subject to provisions and limitations of Act of July 17, 1914, I think no extended discussion or consideration of the scope and effect of that Act is necessary.

It was undoubtedly legislation designed and intended to relieve bona fide agricultural entrymen from the stringent, drastic and inequitable results of Executive orders, that entirely withdrew and classified lands as mineral. There were areas that could be profitably entered, occupied and used as both agricultural and mineral although they had been previously withdrawn or classified as oil lands. As to these surface estates only were created. See Kinney Oil Co. vs. Kieffer, 277 U. S. 504. And there were also areas that prior to withdrawals or classification had been bona fide entered as agricultural lands and were on account of the later executive action all rights of such entrymen were inequitably and seriously impaired and threatened with destruction. Section one of the Act relates to the first type just mentioned. Section three of the Act to the second. It is obvious that the complainant

does not come under the equitable protective features of Section 3 of the Act. His homestead entry and the subsequent patent that was issued to him if valid at all must have been granted under Section one. He made his entry after the lands had been withdrawn and classified as mineral and both his entry and patent expressly reserved all oil and mineral rights to the United States to administer and dispose of according to law. Now in order to further carry out its intention and relieve bona fide agricultural entrymen who had made entries or obtained patent prior to the drastic Executive withdrawals or classifications of their lands, the Congress, by Section 20 of the Leasing Act of February 25, 1920, (supra), invested such persons and only such persons with the preferential or exclusive right to any oil and gas prospecting permit or lease that should be granted by the United States covering their lands.

If the land involved was withdrawn or classified at the time of entry so that the entry was made with a reservation of the mineral, as is the case with the complainant, there is no preference right under the Leasing Act. This interpretation appears to have been the one established by the Regulations of the General Land Office as shown by Circular No. 672 in evidence. I think it is the correct rule.

Inasmuch as it has been found that complainant is not entitled to any preferential right under the Leasing Act I deem any finding on the issue of laches to be unnecessary. Nevertheless it is considered proper to observe that the admitted delay of about three years by Mr. Bourdieu after his knowledge of the existence of the defendants' oil lease covering his homestead, speaks forcefully against him in a court of equity. According to the evidence he

idly sat by and through silent acquiescence encouraged the defendants to develop their lease and prove his homestead to contain oil in valuable quantities and then at a late date after speculating upon defendants' expensive explorations and activities, asks that the fruits of their labor and expenditures be transferred to him. His claim is stale and inequitable.

The case involves oil lands. Property rights in such areas should be asserted with celerity. A suitor cannot be allowed to remain passive, eager to appropriate the benefits of another's activity if success is achieved or to assume an attitude of laissez faire if the other efforts result in failure. Hayward vs. National Bank, 96 U. S. 618. In Johnston vs. Standard Mining Company, 148 U. S. 360, the Supreme Court held that the defense of laches was particularly applicable where the thing in dispute is mining property, which is of uncertain character and liable to suddenly develop a great increase in value. See also Patterson vs. Hewitt, 195 U. S. 321, and Taylor vs. Salt Creek Oil Co. (CCA 8), 285 F. 532.

I find nothing in the bond requirement provisions of Section 2 of the Act of July 17, 1914, that constitutes defendants trespassers upon the land in question and therefore not entitled to invoke the doctrine of laches against complainant. The opinion of Mr. Justice Van Devanter in Kinney Oil Co. vs. Kieffer, supra, contains illuminating and instructive matter on this issue.

Findings and decree pursuant to this memorandum for defendants with costs. Solicitors for defendants will prepare, serve and present same under the Rules.

October 1, 1934.

[Endorsed]: Filed Oct. 1, 1934 R. S. Zimmerman Clerk By B B. Hansen Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PROPOSED FINDINGS OF FACT SUBMITTED BY COMPLAINANT AND CORRECTIONS IN FINDINGS SUBMITTED BY DEFENDANTS.

I-II-III

Paragraphs I, II and III of the proposed findings of fact submitted by defendants are hereby approved as to form.

III-A

Complainant proposes the following additional finding of fact concerning which there is no controversy in the evidence, such finding to be given number III-A and to read as follows:

In 1882 the Surveyor's Return of the original survey showed the lands involved in this suit were non-mineral in character and no contest or protest has ever been filed in the United States Land Office challenging the agricultural character of these lands.

EVIDENCE

Complainant respectfully refers the court to the following evidence in support of this proposal:

Plaintiff's Exhibit No. 4-a and 4-b.

Certified copy of field notes of survey prepared August 19, 1882—field notes (4-a) covering exterior lines of T 21 and 22, R 17 S. T 22, R 18 S and (4-b) covering field notes on the interior lines of the same townships. These field notes among other things recited:

"T 21 S, R 17 E is very broken and mountainous and is used by the settlers for sheep husbandry and affords

ample pasturage for thousands of sheep in the spring time, but owing to its scarcity of water is not used much in the summer. Greasewood, sage and bunch grass abounds. Minerals have not been found."

Stipulation by Mr. Clark (Transcript page 218)

"I am willing to stipulate that the deputy surveyor making the report of those field notes said that the lands were agricultural lands in 1882, and that as to some of them, with respect to one part of the township, he said no minerals had been discovered."

It will be observed that the part in which he stated no minerals had been found includes the lands involved in this suit.

Deposition of Mr. Ing, Register of the United States Land Office in Sacramento, California:

"Q. Referring to the serial register of these various entries recorded and which you have described relating to Section 30, state, Mr. Ing, whether or not any contest or protests have been made charging that the land is mineral in character

"A. Neither upon the tract book nor upon the serial register which pertains to those entries made in the north half of the section does there appear any record that any contest involving the mineral character or non-mineral character of the land has been filed.

Q. Mr. Ing, will you state that, so far as the records of your office show, there has not been any hearing had, or any decision rendered holding that Section 30 was mineral in character?

A. I find nothing in the record to show that any hearing was had either by this office or the former Visalia office involving the character of the land.

Q. If any decision had been rendered in a contest or protest case involving Section 30 either by the Commissioner of the General Land Office or by the Secretary of the Interior, such decision would be entered on your record would it not?

A. That would be the regular course. Yes, sir. The rule of the office. They are placed upon the tract book or upon the Serial Register or in both places where it involves an adjudication of land.

Q. You have no notation of any such decision?

A. I have not been able to find any record of it. I don't find any."

III-B

Complainant proposes the following additional finding concerning which there is no controversy, such finding to be given number III-B and to read as follows:

On August 15, 1907 a temporary executive order was issued purporting to withdraw for classification large areas of land in Fresno and King Counties, California, including the land involved in this suit. Pursuant to this order, geologists Arnold and Anderson, with a corps of assistants of the Geological Survey, devoted nearly a year to an investigation of the character of the lands withdrawn under this order. On June 15, 1908 they recommended that part of this land be classified as oil land, which were within the blue line on the map accompanying their report. This recommendation was later confirmed by the Director of the Geological Survey and the Secretary of the Interior. Accordingly on June 17,

1908 such lands were classified as mineral and were then "withdrawn as mineral land". The land involved in this suit was without the blue line and was classified as "non-mineral" land, returned to agricultural entry and remained open to agricultural entry until December 30, 1910. No field work in this area was done by the Geological Survey subsequent to the above report.

EVIDENCE

All the evidence establishing the above facts is uncontroverted and is contained in the official record introduced by defendants (Bulletin 623) and was further corroborated by the oral testimony of Mr. Arnold.

Letter of August 15, 1907 (page 102, Bulletin 623);

Letter of July 10, 1907 (page 107, Bulletin 623);

Letter of June 17, 1908 (page 105, Bulletin 623).

IV.

Complainant approves as to form the proposed finding submitted by defendants under paragraph IV down to and including the word "land" on line 16, page 3. Plaintiff proposes that the balance of said paragraph be stricken, such language being:
"and the said oil section then and there classified the said land as oil and gas lands".

This proposal is based on the fact that such finding is contrary to the evidence and is at variance with the expression by the court in its memorandum of the decision.

Referring to the order of December 30, 1910, the court in its opinion, states, beginning on line 17, page 5:

"I think it is clear that it was classified as oil land by such withdrawal order ....." "the document amounts to

nothing less than a classification of all of the section of land in which the area in suit is located and withdrew such oil land from all entry or acquisition....." "the order of December 30, 1910 also establishes beyond doubt that the land involved in this controversy was classified as oil land by the Presidential action of that date".

V.

Complainant approves as to form Paragraph V of defendants' proposed findings.

VI.

Complainant approves as to form Paragraph VI of defendants' proposed findings providing there is inserted, after the word "classified" line 20, page 8, paragraph VI the words "or reported to be valuable" in order to constitute an accurate quotation from Section 1 of the Act of July 17, 1914; and providing the words "as such" found in line 5, page 8, be stricken and likewise the words "classified and" found in line 10, page 8, be stricken as these words involve a legal conclusion having no place herein.

In paragraphs V and VI, page 27 of defendants' proposed conclusions of law, it is stated that as a conclusion of law, the lands involved herein were withdrawn as mineral or petroleum. To this statement as contained in the legal conclusions, there is no objection. It should not appear however, in the findings of fact.

VI-A.

Complainant submits the following additional finding of fact regarding which there is no conflict in the evidence, said finding to be given number VI-A and to read as follows:

Subsequent to the executive order of December 30, 1910, no classification as mineral has been made affecting the lands involved in this suit, and there is no official record of any such classification other than as may be contained in the order of that date.

EVIDENCE

As evidence in support of this proposed finding, complainant respectfully refers the court to Plaintiff's Exhibit No. 29, page 4:

"Washington, D. C.,
July 17, 1931.

Mr. A. B. Dorman,
c/o Vogelsang,
Mills Building,
Washington, D. C.

Dear Sir:

In repely to your informal inquiry of July 15, 1931 requesting to be advised of the date of any classification made by the Geological Survey of Section 30 Township 21 South, Range 17 East, M. D. M. California.

Subsequent to order of withdrawal of December 30, 1910 Petroleum Reserve No. 16 California No. 7 the Geological Survey has not made a mineral classification of this section.

Very truly yours,

JULIAN SEARS
Acting Director".

Contained in the evidence introduced by defendants (Bulletin 623) there is an index purporting to contain the official record of all withdrawals and all classifications as compiled by Mr. Max Ball, defendants' witness. Herein is found the following statement and likewise a complete record of all classifications including the lands of this suit.

INDEX OF BULLETIN

"In the following index every order of withdrawal, classification or restoration affecting lands in a township is given under the date on which the order was approved....."

"T 21 S, R 17 E:	Page
Withdrawal Aug. 15, 1907.....	102
Classification June 17, 1908.....	105
Restoration July 10, 1908.....	107
Withdrawal December 30, 1910...	237"

VII.

Complainant approves as to form paragraph VII of defendants' proposed findings.

VII-A.

Complainant proposes an additional finding to be given number VII-A and to read as follows:

The lands involved in this suit were not known to be valuable for mineral at the date of complainant's entry, March 6, 1919.

EVIDENCE

On this subject, complainant respectfully refers the court to the only evidence on this subject which is found in the testimony of Mr. Arnold.

TESTIMONY OF MR. ARNOLD (See Tr. p. 280)

"Q Were the lands involved in this action, that is Lots 1 and 2 and the East 1/2 of the Northwest 1/4 and the Northeast 1/4 of Section 30 – 21 – 17, known mineral land on March 6, 1919?

A. There was nothing developed between the time we did our work there and 1919 that led me to change my opinion about the classification we gave in 1907.

Q. When in your opinion did the land become known mineral lands?

A. Well, I would say with the drilling of the Huffman well.

Q. About the year 1930?

A. Yes, sir."

Mr. Ball did not contradict this testimony is evidenced by the following quotation (Tr. p. 411):

TESTIMONY OF MR. BALL:

"Q The 18000 acres?

A Yes.

Q Indicated that it might possibly be mineral, or that it was known mineral?

A It couldn't be known mineral. You can't have known oil and gas land until you drill a well and produce oil."

MR. CLARK (Tr. p. 472):

"The reason is simply this. We never offered Mr. Ball to show that these lands were value for oil and he did not so testify. The record will bear me out in that statement".

VIII, IX, X, XI and XII.

Complainant approves as to form paragraphs VIII, IX, X, XI and XII.

XIII.

Complainant approves this finding as to form subject to the insertion of the following language after the word "suit" on line 15, page 22, to-wit:

"except insofar as this may be shown by defendants' failure to serve complainant with written notice of intention to apply for permit as required by the regulation of the Land Office."

XIII-A

Complainant proposes the following additional finding to be known as paragraph XIII-A, in language as follows:

Complainant entered into the physical possession of the lands involved in this suit on the 6th day of March, 1919, built a residence, improved and cultivated the same as his homestead; by virtue of the patent subsequently issued to him and subject to its provisions, he remained in the open, continuous and exclusive possession of said land down to and subsequent to the filing of this suit, such patent being the one referred to in Paragraph X of these findings; that thereafter to-wit, on or about the 1st day of April, 1933, defendants made entry on said land by virtue of the lease hereinbefore referred to, approved by

the Department of the Interior on the 22nd day of November, 1929, and issued in December of that year, and since said entry, have remained in the exclusive and uninterrupted possession thereof; that in making entry no bond, as required by the Act of July 17, 1914, was given or suit instituted in any competent court by the defendants to fix damages, nor was any agreement for damages entered into as therein provided; that complainant asserted no claim to other lands embraced in defendants' lease or right to possession thereof.

EVIDENCE

Complainant respectfully calls the attention of the court to the following evidence concerning which there has been no controversy:

The evidence pertaining to the above is found in the testimony of complainant and the certificate of the County Clerk of Fresno County, and is as follows:

MR. BOURDIEU (Tr. 247)

Q. Have you ever made any agreement with any of the defendants for the payment to you of any damages for their going on your property?

A. No, sir.

Q. Has any suit been filed against you to adjudicate the amount of damages that your lands have sustained by reason of the entry of any of these defendants?

A. No sir.

Plaintiff's Exhibit No. 3—Certificate of County Clerk of Fresno County dated October 14, 1933 to the effect that none of the defendants have filed an action since January 1st, 1914 against Jean Bourdieu for the purpose

of ascertaining or fixing damages to the above described lands.

The complaint alleges Bourdieu's possession of the land and the answer of defendant admits the plaintiff's possession.

MR. BOURDIEU TESTIFIED (Tr. p. 43):

Q. At the time that you filed this action, that is, July 1st, 1931, had any prospecting been done on your lands?

A. No sir. Neither for oil or any other purpose. A well was commenced in the spring of 1933.

A map introduced by defendants shows that the well referred to above was commenced to drill in April, 1933.

XIV.

Complainant objects to this paragraph in its entirety as not being supported by any evidence and is based upon a legal conclusion.

In the event the court should not sustain complainant in this objection, complainant moves to strike the words "is now", line 19, page 22, and to substitute therefor the words "was on the date of the filing of this suit".

The map introduced by the defendants in evidence, shows conclusively that defendants entered upon the lands involved in this suit on or about April 1st, 1933 and for the first time began to explore and drill for oil; that prior to this date, complainant had been in the uninterrupted possession of these lands.

Complainant moves to strike the words beginning line 27, page 22, Paragraph XIV to the end of the paragraph and which read as follows: "and the complainant never has had and does not now have title to or any rights whatsoever in or to the oil or gas in the said lands nor

any right to prospect for, mine and remove deposits of oil or gas therefrom," in that the above is purely a conclusion of law and has no place in these findings.

XV.

Complainant objects to Paragraph XV in its entirety and requests that this proposed finding of fact be stricken as there is no allegation in the pleadings nor in the answer which makes this finding material and it is further objectionable in that it is a repetition of similar matters contained in paragraph XIII.

XVI.

Complainant objects to paragraph XVI in its entirety for the reason that this proposed finding is in no respect a finding of fact but is a conclusion of law in its entirety.

XVII.

This proposed finding is approved as to form provided the language beginning line 27, page 23 be stricken therefrom, to-wit:

"The complainant is not qualified by reason of his said homestead entry or otherwise or at all, so as to entitle him to a preference right to a permit or to a lease in case of discovery," as being a conclusion of law and not a finding of fact.

XVIII.

The first paragraph of this proposed finding, beginning line 1 and ending line 6, page 24, is objected to as a conclusion of law.

Complainant moves to strike this paragraph which reads as follows:

"The said Thomas M. Crum did not illegally or wrongfully procure or obtain the said oil and gas prospecting permit, Visalia No. 09551, now Sacramento No. 019438; and the issuance of said permit to the said Thomas M. Crum was not in violation of any rights of complainant herein."

The second paragraph of defendants' proposed finding beginning line 7, down to line 11, page 24, is approved as to form, but the balance is objectionable and should be stricken as a legal conclusion to-wit: "and no notice was required to be given the complainant by Thomas M. Crum or otherwise, or at all".

This last statement is obviously a conclusion of law and is contrary to the provisions of the permit. The permit issued to Thomas M. Crum contained, among other things, this language:

"14. Valid rights existing at the date of this permit will not be affected hereby."

XVIII-A.

Complainant proposes an additional finding to be inserted as paragraph XVIII-A and to be substituted for paragraph XIX submitted by defendants, to be in words as follows:

Complainant herein knew approximately eighteen months prior to the filing of the bill of complaint herein that defendants held an oil and gas lease covering 2560 acres, including the 320 acres above in Paragraph II of these findings of fact, described, and described in paragraph III of the amended bill of complaint, to-wit:

Lots 1 and 2, the East Half (E½) of the Northwest quarter (N¼) and the Northeast Quarter (NE¼) of Section Thirty (30), Township Twenty-one South (21S), Range Seventeen East (17E), Mt. Diablo Base and Meridian,

and during all that time knew that defendants, Kettlemen Oil Corporation, Ltd., and Pacific Western Oil Company, in reliance on the validity of the said lease of oil and gas lands, were expending large sums of money to explore and prospect for oil and gas on the lands embraced in the said lease other than those involved in this action, to which complainant made no claim. Nevertheless complainant, during all that time asserted no claim and made no protest of any nature but remained in the possession of the above lands and relied upon written notice required by the Department's regulation, and the filing of a bond as provided in the Act of July 17, 1914; by this silent acquiescence complainant permitted defendants to develop the lands covered by their lease.

XIX.

Complainant objects to Paragraph XIX of defendants' proposed findings of fact in that it is not based upon any evidence and further because it is contrary to evidence introduced by defendants and is a conclusion of law.

In the event the court overrules said objection, complainant moves to strike the figures "3 years" as found in line 15, page 24 and to substitute therefor "approximately 18 months" as the uncontradicted testimony is that Bourdieu learned of the lease in January or February of 1930 and, as appears from defendants' own evidence, this lease was not approved by the Department until November 22,

1929 and was issued by the Department thereafter during the month of December of the same year.

Complainant moves to strike the words beginning line 2, page 25 down to line 11, page 25 in that it is a conclusion of law and contrary to fact.

The above words involve a legal conclusion in that "silent acquiescence" is not encouraging but uniformly held by all courts, unless accompanied by words or acts, not to amount to encouragement. There is no evidence before the court that complainant at any time by any act or deed or utterance of any word lent encouragement to defendants of any nature.

The above proposed finding is contrary to fact in that the evidence establishes that entry of section 30 for the first time was made on or about April 1, 1933 and then an attempt was made to prove the existence of oil in said section.

Complainant moves to strike from line 9, page 25, the words "lawful and" in that the above is clearly a legal conclusion as it assumes that no written notice was required and that no bond was necessary as provided in the Act of July 17, 1914, as a condition for entry.

It will be noticed that defendants' lease as appears herein, provides in Section "j" as follows:

"Defendants agree—

"To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas

therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas."

The proposed finding of defendants, paragraph XIX above, would deprive complainant of his homestead right and all claim for damages arising therefrom in its suggested form.

The principle of laches is based upon equitable estoppel. In the instant case this is determined by the question of possession of the land preceding the date of the filing of this suit. It is assumed that complainant originally had a preference right to prospect on the lands embraced in his homestead but has subsequently lost this right by reason of his conduct and is now estopped from asserting such right.

The facts are that complainant was in the exclusive possession of the land until April 1, 1933, more than 20 months after the filing of this suit, when, for the first time, his possession was disturbed. If he had a preference right given by law in the beginning, such right was in the nature of a incorporeal hereditament running with the land and based upon title and possession in the complainant. This right could have been divested only by compliance with notice and the giving of the bond, or by such change in possession as would follow defendants' entry thereon, in violation of his right. This change did not take place until many months subsequent to the bringing of this suit.

Complainant claimed the preference right solely as to the 320 acres in his homestead and he had no claim whatsoever to the other 2240 acres embraced in defendants' lease. When, in October, 1929, defendants started

to prospect on Section 28, two miles distant, complainant had no legal right to interrupt this drilling nor to protest against its continuance. This work was taking place on land to which he had no claim whatsoever. If complainant had protested, he would have had no standing in any court.

Complainant owed no duty whatsoever to do anything until his possession was interfered with. By neither word nor deed did he do anything to raise the basis of an equitable estoppel so long as he was in undisturbed possession of the land upon which he had a legal claim.

On the other hand defendants owed a duty to give written notice and to provide a bond as a legal requirement before making entry thereon. Then for the first time, a duty would arise to complainant to assert his right and if he failed to act, laches might be imputed to him.

Defendants had the same knowledge and means of knowledge as complainant since his rights were founded upon a public statute. Defendants had notice of complainant's possession and all rights thereunder as a matter of law. Complainant was guilty of no act or the utterance of any words which would raise an equitable estoppel. No duty or obligation rested upon him so long as his possession was not interfered with. A specific duty was imposed by law upon defendants with which they failed to comply. This duty and obligation in the form of notice and bond must be assumed to be true since the whole argument of laches is founded upon the original right of preference existing in complainant which he subsequently lost by reason of unconscionable conduct.

XX.

Complainant approves as to form, all of this paragraph down to line 21, page 25 and ending with "association" and moves to strike the balance of the paragraph reading as follows:

"and whatever the claims of defendants, Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association in or to the premises described in the second paragraph of these findings of fact, or in or to the said oil and gas lease of October 4, 1929, covering the said lands, the said claims are not nor have they ever been without right as against the complainant, nor is any of them subject or subservient to the claimed right of the complainant herein"

in that the above is clearly a conclusion of law, having no place in these findings.

XXI.

Complainant respectfully submits paragraph XXI of defendants' proposed findings of fact should be stricken and proposes in lieu thereof, the following:

Complainant was in the physical possession of the lands involved in this suit at the time of the filing of the same; he asserted no claim to the prospecting right on other lands embraced in defendants' lease; defendants did not disturb his possession prior to April 1, 1933 and made no attempt to prospect on said land to prove it valuable for oil until said date. On the above date defendants made entry and took possession thereof.

Complainant respectfully submits that defendants' proposed finding beginning line 6, page 26 to line 10, which reads as follows:

"The exclusive possession of said land was delivered to Kettleman North Dome Association on April 1, 1931 under and by virtue of the terms of the Kettleman North Dome Association Unit Agreement, which Agreement was approved by the Secretary of the Interior of the United States on January 31, 1931"

should be stricken in that there is no evidence introduced in support of this statement and it is a legal conclusion.

Complainant asserts no claim to the land in the lease other than the 320 acres involved in this suit.

The purpose of including such finding is to preclude complainant in any right to demages as it is obvious that if defendants were in "lawful and exclusive possession" of complainant's homestead he could have no right thereto. Furthermore, the above proposed finding is contrary to the covenent contained in the lease itself wherein defendants agree to strictly observe all the statutes and regulations of the Department which contain, among other matters, provision for notice and provision for the giving of a bond before entry upon lands issued under the provisions of the Act of July 17, 1914.

CONCLUSIONS OF LAW

Complainant approves as to form, paragraphs I, II, III, IV, V and VI of defendants' proposed Conclusions of Law.

VII.

Complainant objects to the words of this paragraph beginning Line 3, page 28 as follows:

"Property rights or claims thereto in areas involving oil lands must be asserted with celerity and no person is allowed to await the result of another's effort to decide whether or not he will assert a claim"

in that it is a statement of a general principle of law that has no application herein. In order to make applicable, there should be added the following statement, to-wit:

"providing the claimant is out of possession and has a legal duty to assert his rights".

VIII and IX.

Complainant approves in form each of these paragraphs.

X.

Complainant respectfully submits that there are no facts supporting this Conclusion and moves that this paragraph be stricken for the following reasons:

1—A permit to prospect does not purport to give possession.

2—The permit issued specifically provides that all outstanding rights shall not be affected.

3—The second paragraph beginning line 11, page 29, to line 16, page 29, is not material as it states the agreement was approved by the Secretary of the Interior on January 31, 1931, five months before the filing of this suit, and possession was given on April 1, 1931, three months before filing this suit. Both these statements are

contrary to the evidence submitted by defendants that they made entry in April, 1933, and took possession on that date. Complainant is not concerned with other lands embraced in defendants' lease, as he had no claim thereto and no legal right to interrupt defendants' possession of such other lands.

XI.

Complainant approves this paragraph as to form.

Respectfully submitted,

Chandler, Wright & Ward,
CHANDLER, WRIGHT & WARD,
By A. B. Dorman
and Howard W. Wright
Attorneys for Complainant.

Nov. 17, 1934.

The foregoing proposed findings of fact are not adopted. The Court has this day made, signed and filed Findings of Fact and Conclusions of Law Herein. Exceptions allowed Complainant

Paul J. McCormick
Judge

[Endorsed]: Filed Nov. 15, 1934 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT

This cause having come on regularly for trial on the merits on October 19, 1933, before the undersigned, Judge of the United States District Court for the Southern District of California, Central Division, and oral and documentary evidence having been introduced by the respective parties and the cause having been argued and submitted to the court for decision, the court, being now sufficiently advised and informed in the premises for the purposes hereof files herein its written memorandum of decision which is made a part hereof and makes the following further findings of fact:

I.

The Complainant, JEAN BOURDIEU, is a citizen of the United States of America and a resident of the County of Fresno, in the State of California, in the Northern Division of the Southern District of California; the defendant PACIFIC WESTERN OIL COMPANY is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the United States of America and a resident of the State of Delaware; the defendant KETTLEMAN OIL CORPORATION, LTD., sued herein as and formerly named Kettleman Oil Corporation, is a corporation organized and existing under the laws of the State of Delaware and is a citizen of the United States of America and a resident of the State of Delaware; the defendant KETTLEMAN NORTH DOME ASSOCIATION, is a non-profit cooperative corporation organized and existing under the laws of the State of California and is a citizen of the United States

of America and a resident of the State of California; the defendant FRANK KENNEDY is a citizen of the United States of America and a resident of the State of California; and the defendant FRANKLIN R. KENNEY is a citizen of the United States of America and a resident of the State of California.

II.

The lands described in paragraph III of the amended bill of complaint herein, to wit:

Lots 1 and 2, the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section Thirty (30), Township Twenty-one South (21S), Range Seventeen East (17E), Mt. Diablo Base and Meridian, containing 322.89 acres according to the official plat of the survey of the said land,

are situated in the County of Fresno, State of California, and prior to December 30, 1910, were public lands of the United States of America.

III.

The value of the subject matter of this suit exceeds Six Thousand Dollars ($6,000.00), exclusive of interest, costs, and expenses.

IV.

On December 27, 1910, the Land Classification Board, Oil Section, of the United States Geological Survey convened in its office at Washington, District of Columbia, considered evidence relating to the character of the lands in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, in the County of Fresno aforesaid, and of other lands in Townships 20 and 21 South,

Range 16 East, and Townships 20, 21 and 22 South, Range 17 East, Mt. Diablo Base and Meridian, in the said State of California, and decided that all the land in said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, together with other lands in Townships 20 and 21 South, Range 16 East, and Townships 20, 21 and 22 South, Range 17 East, Mt. Diablo Base and Meridian, should be classified as oil and gas lands, and the said Oil Section then and there classified the said lands as oil and gas lands.

V.

On December 28, 1910, H. C. Rizer, then Acting Director of the said United States Geological Survey, by written communication dated December 28, 1910, informed the Secretary of the Interior that information received from the field indicated that all the lands in the said Section 30, in Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, together with other lands in said Townships 20 and 21 South, Range 16 East, and in said Townships 20, 21 and 22 South, Range 17 East, Mt. Diablo Base and Meridian, were valuable for oil, and that he therefore recommended the submission to the President of the United States, for appropriate action, of a certain form of order of withdrawal which was appended to his said written communication to the Secretary of the Interior. On December 29, 1910, Frank Pierce, then Acting Secretary of the Interior, in writing referred to the President of the United States, with favorable recommendation, the said written communication

from the Acting Director of the said United States Geological Survey, together with the said form of order of withdrawal therein mentioned and thereto appended. On December 30, 1910, the Honorable Wm. H. Taft, President of the United States, signed and promulgated a certain Executive Order whereby he ordered that all the lands in said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, together with other lands in the said order described, be and the said lands were thereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to Authorize the President of the United States to make Withdrawals of Public Lands in Certain Cases", approved June 25, 1910 (Act of June 25, 1910, 36 Stat. 847).

VI.

The said written communication of December 28, 1910, from the Acting Director of the United States Geological Survey to the Secretary of the Interior, and the said reference by the said Acting Secretary of the Interior, with favorable recommendation, to the President of the United States, and the said Order of Withdrawal of December 30, 1910, so signed and promulgated by the President of the United States as aforesaid, were and are in words and figures as follows, to wit:

~~T 1~~ ~~1422734 1~~
7—1

DEPARTMENT OF THE INTERIOR
UNITED STATES GEOLOGICAL SURVEY
WASHINGTON

Office of the Director

December 28, 1910

The Honorable,
The Secretary of the Interior.

Sir:

Information received from the field indicates that the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action:

Very respectfully,

H. C. Rizer
Acting Director.

December 29, 1910.

Respectfully referred
to the President with ECF
favorable recommendation.

Frank Pierce,
Acting Secretary.

[Stamped]: Received Jan 3 1911 G. L. O.

[Stamped]: 99352 Received G. L. O. Jan. 3 1911 Reference to .... Assigned to W P W Answered by ..... Noted ..... Filed ...

[Written]: To R & R Visalia 1/3/11 W P W 'N"
" Div 1-5-11 Posted in N [illegible]

SPECIAL

December 30, 1910

ORDER OF WITHDRAWAL

Petroleum Reserve No. 16—California No. 7.

It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910:

~~T 2~~ ~~1422734 2~~
7—2

Oil—California No. 7, p. 2.

Mt. Diablo Meridian, California.

T. 20 S., R. 16 E., Sec. 25, SW¼;
Sec. 26, all;
Sec. 34, E½;
Sec. 35, all;
Sec. 36, all.

T. 21 S., R. 16 E., Sec. 1, all;
Sec. 2, all;
Sec. 3, S½;
Sec. 4, N½ of NW¼, SE¼ of NW¼, NE¼ of SW¼, SE¼;
Sec. 9, N½ of NE¼, SE¼ of NE¼, NE¼ of SE¼;

Sec. 10, all;
Sec. 11, all;
Sec. 12, all;
Sec. 13, all;
Sec. 14, all;
Sec. 15, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;
Sec. 23, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;
Sec. 24, all;
Sec. 25, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

T. 20 S., R. 17 E., Sec. 31, SW¼.

T. 21, S., R. 17 E., Sec. 6, all;
Sec. 7, all;
Sec. 8, all;
Sec. 16, W½ of NW¼, SW¼;
Sec. 17, all;
Sec. 18, all;
Sec. 19, all;
Sec. 20, all;
Sec. 21, W½ of NE¼, W½, W½ of SE¼, SE¼ of SE¼;
Sec. 26, SW¼ of SW¼;
Sec. 27, W½ of NW¼, SE¼ of NW¼, S½;
Sec. 28, all;

Sec. 29, all;

Sec. 30, all;

Sec. 31, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼;

Sec. 32, N½, N½ of SW¼, SE¼.

T. 22 S., R. 17 E., Sec. 4, NW¼, E½ of SW¼.

99552-2

2

~~T 3~~ ~~1422734 3~~

7—3

Oil—California No. , p. 3.

The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres.

Wm H Taft

President.

DEC 31 1910

Referred to the Commissioner of the General Land Office for appropriate action. ECF

R A Ballinger

Secretary.

The said lands in the said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, together with the other lands described in the said Executive Order of December 30, 1910, were by the said Executive Order classified as petroleum lands and were withdrawn as such from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States; and all the said lands in the said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, remained so classified and withdrawn from settlement, location, sale, or entry from the date of the said presidential order of withdrawal until February 25, 1920, except that the Act of July 17, 1914, (38 Stat. 509, U. S. C. A. Title 30, sections 121, 122, and 123) qualified them, the said lands in the said Section 30, for appropriation, location, selection, entry, or purchase, if otherwise available, under the non-mineral land laws of the United States, if the location, selection, entry, or purchase thereof was made with a view of obtaining or passing title with a reservation to the United States of the oil and gas on account of which the said lands were so withdrawn and classified as aforesaid, together with the right to prospect for, mine, and remove the same; and provided that all applications to locate, select, enter, or purchase the said lands in the said Section 30 should state that they were made in accordance with and subject to the provisions and reservations of the said Act of July 17, 1914.

VII.

On March 6, 1919, the complainant, JEAN BOURDIEU, filed in the United States Land Office, at Visalia, California, a certain Homestead Entry in words and figures as follows, to wit:

[Stamped]: Earned "M" S. H. W. 1404577-1

10— Y h— 4—003 9√√√

24— (Form approved by the Secretary of the Interior December 14, 1909.)

7 22

2-19-09
7-17-14
9- 5-14

[Stamped] RECEIVED
U. S. LAND OFFICE
VISALIA, CAL.
Date Mar—6 1919
Hour 1:30pm

DEPARTMENT OF THE INTERIOR

HOMESTEAD ENTRY
(Act of February 19, 1909)

[Stamped] Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 598).

U. S. Land Office, Visalia Calif. Serial No. 08309
Receipt No. 2281014
3-6-19

APPLICATION AND AFFIDVAIT

I, Jean Bourdieu (male), a resident of Coalinga Fres-
(Give full Christian name.) (Male or female.)
no Co, Calif., do hereby apply to enter, under the act of
(Town, County, and State.)

February 19, 1909 (35 Stat., 639), the Lots 1, 2, E^2 NW^4: NE^4; Section 30, Township 21 S., Range 17 E., MD Meridian, containing 322.89 acres, within the Visalia Calif, land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I have declared my intention to become

(Applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this aplication.)

(Declaration of Intention on file with Visalia 06903)

a citizen of the United States, and am single & over 21

(State whether the head of a family, married or unmarried, or over twenty-one years of age, and if not over twenty-one, applicant must set forth the facts which constitute him the head of a family.)

years of age; that my post-office address is Box 815, Coalinga, Calif.; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary

to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the homestead, timber and stone, desert land, or preemption laws (except H. E. 06950, San Francisco series

(Here describe former entry or entries by section, township, range, land district, and number of entry; how perfected, or if not perfected state that fact.)

for 160 acres in Sec. 33, T. 22 S. R. 14 E. MDM—~~not~~ relinquished; that I am well acquainted with the character of the land herein applied for and with each and

[Written on side]: "C" 06903 Oct 20, 1917. 101

every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under

the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian; that the lands applied for do not contain merchantable timber, and no timber ~~except~~ .....

(Here fully describe amount and kind of timber, if any.)

Reference is made to letter "C" F NO. Visalia 06903, dated Oct. 20, 1917, authorizing applicant to make Second Entry Posted in 101/105–AUG 4 1919 E.L.F. 9/26/19 Cross-posted Vol. 96/215 W. E. M."O".

1404577-2

and that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply ~~except the following areas:~~ .....

(Give the subdivision and area of the lands, if any, susceptible of irrigation.)

Subject to provisions ~~to~~ and reservations and limitations of Act of July 17, 1914.

Jean Bourdieu

(Sign here, with full Christian name.)

☞NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 125, U. S. Criminal Code, below.)

I HEREBY CERTIFY that the foregoing affidavit was read to ~~or by~~ affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known ~~or has been satisfactorily identified before me by~~.....
.....); that I verily be-
(Give full name and post-office address.)
lieve affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my affice, in Visalia, Calif. .....,
(Town.) (County and State.)
within the Visalia Calif. land district, this 6th day of March, 1919

Carl A. Ferguson
Register.
(Official designation of officer.)

We, Hans R. Sumpf, of Coalinga Calif., and John E. Arnaud, of....."....", do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

Hans R. Sumpf.
John E. Arnaud.

I HEREBY CERTIFY that the foregoing affidavit was read to ~~or by~~ affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known ~~(or have been satisfactorily identified before me by~~.....); and that said affidavit was

duly subscribed to before me at Visalia Calif. this 6th day of March, 1919

Carl A. Ferguson
Register.
(Official designation of officer.)

UNITED STATES LAND OFFICE at Visalia Calif.
March 6, 1919.

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909; that there is no prior valid adverse right to the same, and has this day been allowed.

Carl A. Ferguson
Register.

UNITED STATES CRIMINAL CODE.—CHAP. 6.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, March 4, 1909. 35 Stat., 1111.)

VIII.

On May 28, 1921, the Secretary of the Interior, under the Leasing Act of February 25, 1920, 41 Stat. 437, issued to one Thomas M. Crum United States Oil and Gas Prospecting Permit Visalia No. 09551, now Sacramento No. 019438, covering an area of land within which was and is situate the said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian.

IX.

On June 8, 1925, the Register of the said United States Land Office at Visalia, California, delivered to the said Jean Bourdieu a Register's Final Certificate (homestead) in words and figures as follows, to wit:

1404577-3

MAR, Authorized by "C", 2-25.
4—196

Department of the Interior 5/7/25 "C"
UNITED STATES LAND OFFICE 6/11 D
Visalia, California
Serial No. .08309 Orig

REGISTER'S FINAL CERTIFICATE
HOMESTEAD

(List each payment separately)

Comm. (Fin.),	$24.00	Rect. 2805310
Test. Fee	2.50	Rect. 2805310
Pur. Mon.,	$ 7.22	Rect. 2281014

Comm. (Orig.)	$24.00	Rect. 2281014
Fee	10.00	Rect. 2281014
Int., $.....		Rect. .....
.....		Rect. .....

Act of 2-19-09.

June 8, 1925.
(Date)

It is hereby certified that, pursuant to the provisions of Section 2291, Revised Statutes of the United States, Jean Bourdieu, Box 815, Coalinga, California, has made payment in full for Lots 1, 2, E½NW¼, NE¼ Section 30 Township 21 S., Range 17 E., M. D. Meridian, California, containing 322.89 acres.

Now, therefore, be it known that, on presentation of this Certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said Jean Bourdieu shall be entitled to receive a Patent for the land above described if all then be found regular.

W. S. Hunsaker, Register.

NOTE.—A duplicate of this Certificate is issued to the claimant.

The original is forwarded to the General Land Office, with the entry papers, for approval by the Commissioner of the General Land Office and issuance of patent.

The duplicate copy forwarded to the claimant should be held until notice of issuance of patent is received.

In all correspondence concerning the entry in connection with which this Certificate issued, refer to the NAME

OF THE LAND OFFICE and the SERIAL NUMBER noted hereon.

Posted July 16/25 in Vol. 101, P. 105, by F. H. C. Div. "O."

APPROVED August 19, 1925.

By A. Gutierrez, Division "C."

[Stamped on face of foregoing document]:

JUN 8 1925
Marked "M" H. H.
JUN 8 1925

Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat., 509). as to oil and gas.

Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

Pat NO 967530
Oct 7 1925

X.

On the 7th day of October, 1925, a patent to the lands described in the amended bill of complaint herein was issued to the complainant, JEAN BOURDIEU, which patent was and is in words and figures as follows, to wit:

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Visalia, California, has been deposited in the General Land Office, whereby it appears that, pursuant

to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Jean Bourdieu has been established and duly consummated, in conformity to law, for the Lots one and two, the east half of the northwest quarter and the northeast quarter of Section thirty in Township twenty-one south of Range seventeen east of the Mount Diablo Meridian, California, containing three hundred twenty-two acres and eighty-nine hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States. Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with

the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat., 509).

IN TESTIMONY WHEREOF I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the SEVENTH day of OCTOBER in the year of our Lord one thousand nine hundred and TWENTY-FIVE and of the Independence of the United States the one hundred and FIFTIETH

(SEAL.)

By the President: Calvin Coolidge

By Viola B. Pugh, Secretary.
M. P. LeRoy
Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 967530

[Written on face of the foregoing document]:

~~1367090~~
1404577-4

XI.

On the 8th day of March, 1929, by divers mesne conveyances, the said Oil and Gas Prospecting Permit hereinabove in paragraph VIII described, and the rights and privileges of the original permittee therein and thereunder, became and now are vested in the said Kettleman Oil Corporation, Ltd. and the said Pacific Western Oil Company,

in the proportions of an undivided one-half interest thereof to each of the said named corporations; and, the Secretary of the Interior having determined that discovery had been made of oil and gas in land covered by said permit, thereafter and on the 4th day of October, 1929, the United States of America, by its Acting Secretary of the Interior, executed and issued to the said Kettleman Oil Corporation, Ltd. and the said Pacific Western Oil Company, under the provisions of the said Leasing Act of February 25, 1920, a Lease of Oil and Gas Lands under the Act of February 25, 1920, which lease included and now includes the lands in the said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, and other lands, and which lease is in words and figures as follows, to wit:

98 # I

Two—6
William A Berdel

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

Serial Sacramento 019438 (4)
Lease of Oil and Gas Lands Under the Act of
February 25, 1920

14-13

This Indenture of Lease, entered into, in triplicate, as of the 4th day of October, 1929, by and between the UNITED STATES OF AMERICA, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and Kettleman Oil Cor-

poration, and Pacific Western Oil Company, Delaware Corporations, party of the second part, hereinafter called the lessee, reference being made to an agreement dated July 23, 1929, to be considered in connection herewith, accepted and approved by the Department of the Interior on November 22, 1929, being a covenant with and by and between this lessee and certain other permittees and/or lessees and the Secretary of the Interior, said agreement regulating, controlling and governing the development and production of the North Dome, Kettleman Hills Oil and Gas Field, California, under, pursuant, and subject to the terms and provisions of the Act of Congress approved February 25, 1920 (Public No. 146), entitled "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas, and Sodium on the Public Domain," hereinafter referred to as the act, which is made a part hereof, WITNESSETH:

Sec. 1. *Purposes.*—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the following described tract of land situated in the North Dome, Kettleman Hills Oil Field and more particularly described as follows: NE¼ Sec. 20, Lots 1, 2, E½ NW¼ and NE¼ Sec. 30, and N½ NE¼ Sec. 32, T. 21 S., R. 17 E., M. D. M., California, containing 562.89 acres., together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of twenty (20) years, with the preferential

right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

Serial.....

Sec. 2. In consideration of the foregoing, the lessee hereby agrees:

(*a*) *Bond.*—To furnish a bond with approved corporate surety in the penal sum of $5,000, conditioned upon compliance with the terms of the lease.

(*b*) *Wells.*—To maintain in a state of production wells equal in number to the number of the now existing producing wells on the leased land until the oil deposits are exhausted or until the proven territory has been drilled, and in case such existing wells are less than the number of 40-acre tracts or lots embraced in the lease, to proceed with reasonable diligence within three months of delivery hereof to install on the leased land a standard or other efficient drilling outfit and equipment, and to commence drilling at least one well and to continue such drilling with reasonable diligence to production or to a point where the well is demonstrated unsuccessful, and thereafter to continue drilling with reasonable diligence at least one well at a time until the lessee shall have drilled producing wells which, with any producing wells now on the land, equal in number the number of 40-acre tracts or lots embraced in the leased premises, unless the lessor shall for any reason deemed sufficient consent in writing to the drilling of a less number of wells; the lessee further agrees to drill all necessary wells to offset the wells of others on adjoining land or deposits not the property of

the United States, and on adjoining land operated under Government lease at 5 per cent royalty.

(*c*) *Royalty and Rents.*—To pay the lessor in advance beginning with the date of the execution of this lease, a rental of one dollar per acre per annum during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty on all oil and gas produced from the land leased herein (except oil or gas used for production purposes on said land or unavoidably lost), as follows:

(1) For all oil produced of 30° Baumé or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month	12½ per cent.
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	16⅔ per cent.
On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	20 per cent.
On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month	25 per cent.
On that portion of the average production per well of more than 200 barrels per day for the calendar month	33⅓ per cent.

(2) For all oil produced of less than 30° Baumé:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month..... 12½ per cent.

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month .....14 2/7 per cent.

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month..... 16⅔ per cent.

On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month..... 20 per cent.

On that portion of the average production per well of more than 200 barrels per day for the calendar month..... 25 per cent.

Only wells which have a commercial production during at least part of the month shall be considered in ascertaining the average production above provided for; and the Secretary of the Interior shall determine what are commercially productive wells under this provision.

(3) On gas and casing-head gasoline:

On gas, whether same shall be gas from which the casing-head gasoline has been extracted or otherwise, 12½ per cent of the value thereof in the field where produced where the average production per day for the calendar month from the land leased is less than 3,000,000 cubic feet, and 16⅔ per cent where the average daily production is 3,000,000 cubic feet or over.

On casing-head gasoline, 16⅔ per cent of the value of the casing-head gasoline extracted from the gas produced and sold, computed on the basis provided for in the operating regulations.

The value in the field where produced, of gas and casing-head gasoline, for royalty purposes, unless such gas or casing-head gasoline is disposed of under an approved sales contract or other method as provided in subdivision (*d*) of this section, shall be as fixed by the Secretary of the Interior.

In cases where the gas produced and sold has a value both for casing-head gasoline content and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on both of such values.

When paid in value, such royalties shall be due and payable monthly on the 15th of each calendar month following the calendar month in which produced, to the Receiver of Public Moneys of the land district in which the land is situated; when paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced, unless otherwise agreed to by the parties hereto, at such times as may be required by the

lessor: *Provided*, That the lessee shall not be required to hold such royalty oil in storage longer than thirty days after the end of the calendar month in which said oil is produced: *And provided further*, That the said lessee shall be in no manner responsible or held liable for the loss or destruction of such oil in storage from causes over which the lessee has no control; such royalties, whether in value or kind, shall be subject to reduction whenever the average daily production of any oil well shall not exceed ten (10) barrels per day, if in the judgment of the lessor the wells can not be successfully operated upon the royalties fixed herein.

(*d*) *Sales contracts.*—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(*e*) *Monthly statements.* To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the department.

(*f*) *Plats and reports.*—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders, investment, depreciation, and cost of operation, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor by operations hereunder.

(*g*) *Log of wells.*—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log or copy thereof, shall be furnished to said lessor on demand.

(*h*) *Diligence—Prevention of waste—Health and safety of workmen.*—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby, while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely any

well before abandoning the same so as to effectually shut off all water from the oil or gas bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby; unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste, and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at the lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: *Provided,* That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(*i*) *Taxes and wages—Freedom of purchase.*—To pay when due, all taxes lawfully assessed and levied under the laws of the State upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and em ployees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(*j*) *Reserved deposits.*—To comply with all statutory rquirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(*k*) *Assignment of lease.*—Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(*l*) *Deliver premises in cases of forfeiture.*—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease; but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

Sec. 3. The lessor expressly reserves:

(*a*) *Rights reserved—Easements and rights of way.*—The right to permit for joint or several use easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(*b*) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(*c*) *Pipe lines to convey at reasonable rates.*—The right to require the lessee, his assignees or beneficiary, if owner or operator of, or owner of a controlling interest in, any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands

under such lease, to accept and convey at reasonable rates and without discrimination the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act.

(*d*) *Monopoly and fair prices.*—Full power and authority to carry out and enforce all the provisions of section 30 of the act to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(*e*) *Helium.*—Pursuant to section 1 of the act, the lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor: in case the lessor elects to take the helium, the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *Provided,* That the lessee shall not, as a result of the operation in this section provided for, suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

Sec. 4. *Surrender and termination of lease.*—The lessee may, on consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property: upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Sec. 5. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within six months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen; pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not, within six months, elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within ninety days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected

to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells.

Sec. 6. *Judicial proceedings in case of default.*—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Sec. 7. *Heirs and successors in interest.*—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

Sec. 8. *Unlawful interest.*—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the

Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1919 (35 Stat., 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

IN WITNESS WHEREOF

THE UNITED STATES OF AMERICA,

By Jos. M. Dixon

Acting Secretary of the Interior.

KETTLEMAN OIL CORPORATION,

By Eric McGowan

Vice-President

Witness to signature of

KETTLEMAN OIL CORPORATION

W. W. Simcox

Gene Laswall

PACIFIC WESTERN OIL COMPANY,

By W. C. McDuffie

President

By Harry O. Ravis

Secretary

Witness to signature of—

Pacific Western Oil Co.

H. O. R.

Emily Irene Huyler

Marie Raleigh

State of California } ss.
COUNTY OF LOS ANGELES }

On this 11th day of December A. D., 1929, before me, Harry H. Lyman a Notary Public in and for the said County and State, personally appeared E. McGowan known to me to be the Vice-President, ~~and known to me to be the Secretary~~ H. H. L. N. P. of the KETTLEMAN OIL CORPORATION the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Harry H. Lyman
Notary Public in and for said County and State.

My commission expires June 9, 1933

State of California. } ss.
COUNTY OF LOS ANGELES }

On this 11th day of DECEMBER A. D., 1929, before me, EMILY IRENE HUYLER a Notary Public in and for the said County and State, personally appeared WM. C. McDUFFIE known to me to be the President, and HARRY O. RAVIS known to me to be the Secretary of the PACIFIC WESTERN OIL COMPANY the Corporation that executed the within Instrument, known to me

to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Emily Irene Huyler

Notary Public in and for said County and State.

My Commission Expires Jan. 11, 1931

XII.

The said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, which is described in the said Lease of Oil and Gas Lands under the Act of February 25, 1920, is the same section as the Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, which is described in the Executive Order of Withdrawal of December 30, 1910, in the Homestead Entry, the Register's Final Certificate, and the Patent which are hereinabove set out respectively in paragraphs VI, VII, IX and X of these Findings of Fact.

XIII.

The complainant herein makes no claim that any fraud was practiced or attempted to be practiced upon him by the defendants herein, or any of them, in connection with any matter or thing pertaining to this suit, nor does the complainant claim that there was at any time any fiduciary relationship existing between him and the defendants, or any of them.

XIV.

The complainant, JEAN BOURDIEU, is now and at all times since the 6th day of March, 1919, by virtue of and under the patent therefor which is set out in paragraph X of these Findings of Fact and not otherwise, and subject to the exceptions and reservations in said patent, has been the owner and in possession of the said Lots 1 and 2, the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, hereinabove in paragraph II of these Findings of Fact described, and the complainant never has had and does not now have title to or any right whatsoever in or to the oil or gas in the said lands, nor any right to prospect for, mine and remove deposits of oil or gas therefrom.

XV.

No defendant ever fraudulently or otherwise prevented complainant herein from obtaining from the United States of America any prospecting permit or any oil and gas lease on the premises described as Lots 1 and 2, the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, nor did the complainant herein ever apply for or attempt in any manner to obtain from the United States of America an oil and gas prospecting permit or lease relating to the said lands.

XVI.

The complainant is not now nor has he ever been entitled under Section 20 of the Leasing Act of February

25, 1920, 41 Stat. at L. 437, or otherwise or at all, to a preference right to a permit to prospect upon the said lands or any thereof in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, for oil or gas or, in case of discovery thereof, to a lease.

XVII.

The complainant herein made a bona fide entry of said lands in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, as agricultural but not in the expectation of receiving title to any oil or gas deposits which might be discovered therein; and said entry was expressly made subject to the provisions, reservations, and limitations of the Act of July 17, 1914.

The complainant is not qualified by reason of his said Homestead Entry, or at all, so as to entitle him to a preference right to a permit or to a lease in case of discovery.

XVIII.

The said Thomas M. Crum did not illegally or wrongfully procure or obtain the said Oil and Gas Prospecting Permit Visalia No. 09551, now Sacramento No. 019438; and the issuance of the said permit to the said Thomas M. Crum was not in violation of any right of the complainant herein.

No notice of any kind was given to the complainant by the said Thomas M. Crum of the said Thomas M. Crum's intention to apply for a prospecting permit to explore for oil and minerals on or in the said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, and no notice was required to be given the complainant by said Thomas M. Crum.

XIX.

The complainant herein knew approximately three (3) years prior to the filing of the bill of complaint herein that defendants held an oil and gas lease covering the lands hereinabove in paragraph II of these Findings of Fact described, and described in paragraph III of the amended bill of complaint, to wit:

Lots 1 and 2, the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section Thirty (30), Township Twenty-one South (21S), Range Seventeen East (17E), Mt. Diablo Base and Meridian,

and during all that time knew that defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company, in reliance upon the validity of the said Lease of Oil and Gas Lands, were expending large sums of money to explore and prospect for oil and gas upon lands embraced within the said Lease of Oil and Gas Lands which is dated October 4, 1929. Nevertheless, complainant during all that time asserted no claim and made no protest of any nature but by silent acquiescence encouraged defendants to develop the lands covered by their lease and to prove the existence of oil or gas in said Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian. Defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company were rightfully upon the said land and were not trespassers; and from and since April 1, 1931, Kettleman North Dome Association has been in lawful possession of said lands under and by virtue of the Kettleman North Dome Unit Agreement, and has never been a trespasser thereon.

XX.

The defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company are the owners and holders, in the proportions of an undivided one-half thereof to each, of the said lease of oil and gas lands which is dated October 4, 1929, and which is set out in paragraph XI of these Findings of Fact, and of the estate for years in the said oil and gas lease described, subject to such rights therein or thereto as may exist in the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association; and whatever the claims of the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association in or to the premises described in the second paragraph of these Findings of Fact, or in or to the said oil and gas lease of October 4, 1929 covering the said lands, the said claims are not nor have they ever been without right as against the complainant, nor is any of them subject or subservient to the claimed rights of the complainant herein.

XXI.

The said Kettleman Oil Corporation, Ltd. and the Pacific Western Oil Company, lessees under the said oil and gas lease serial number Sacramento 019438(d), and their predecessors in interest, were in lawful possession of the lands described in the plaintiff's amended complaint from May 28, 1921, until April 1, 1931.

The possession of said land was delivered to the Kettleman North Dome Association on April 1, 1931, under and by virtue of the terms of the Kettleman North Dome Unit Agreement, which agreement was approved by the Secretary of the Interior of the United States on January 31, 1931.

And from the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW.

I.

There was no fraud upon the part of defendants or any of them in connection with any matter or thing pertaining to this case. There was no fiduciary relationship at any time existing between complainant and any of the defendants named in the bill or amended bill of complaint.

II.

None of the defendants, either alone or in combination or otherwise or at all, holds the oil and gas lease covering said lands in trust for complainant.

III.

The complainant is not now nor has he ever been entitled to a preference right to a permit to prospect for oil or gas upon or in the said lands or any thereof in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian. The complainant is not now nor has he ever been entitled to a lease over, on or covering said lands for oil and gas purposes, in case of discovery of oil or gas. The complainant was never entitled to notice of the application of anyone for a prospecting permit covering said lands or any part thereof.

IV.

The complainant is not entitled to compel defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company, or either of them, to transfer their lease to him, nor is he entitled to any of the proceeds from oil or gas or other hydrocarbon substances produced from said

lands under said lease, nor to any of said oil or gas or other hydrocarbon substances produced or which have been or may be produced from said lands.

V.

At and prior to the time of complainant's Homestead Entry, the said lands and all of them in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, were withdrawn from entry as petroleum lands and were also classified as such and complainant could not by said entry or any act subsequent thereto in connection with the perfection of said entry establish a preference right to a permit to prospect for oil and gas or a right to an oil and gas lease in case of discovery of oil or gas.

VI.

Oil lands or petroleum lands are mineral lands within the meaning of the laws of the United States relating to mineral lands and the acquisition of title therein; and if lands are withdrawn or classified as mineral at the time of entry so that entry is made with a reservation of the mineral, as is the case with the complainant, there is no preference right to a prospecting permit under the Leasing Act of February 25, 1920, or otherwise or at all.

VII.

Complainant, as a matter of law, has been guilty of laches in the assertion of his claim. Property rights or claims thereto in areas involving oil lands must be asserted with celerity and no person is allowed to await the result of another's effort to decide whether or not he will assert a claim.

VIII.

None of the defendants named in the first of the Findings of Fact herein is or was a trespasser upon the lands or any of them in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, and said defendants are and were and each of them is and was entitled to invoke the doctrine of laches against complainant.

IX.

The defendants named in the first of the Findings of Fact herein are entitled to a decree that the complainant herein take nothing by virtue of his bill of complaint or amended bill of complainant, and that the defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company are the owners and holders, in the proportions of an undivided one-half thereof to each, of the said lease of oil and gas lands which is dated October 4, 1929, and which is set out in paragraph XI of the foregoing Findings of Fact, and of the estate for years in the said oil and gas lease described, subject to such rights therein or thereto as may exist in the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association; and that whatever the claims of the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association in or to the premises described in the second paragraph of the foregoing Findings of Fact, or in or to the said oil and gas lease of October 4, 1929 covering the said lands, the said claims are not nor have they ever been without right as against the complainant, nor is any of them subject or subservient to the claimed rights of the complainant herein.

X.

The said Kettleman Oil Corporation, Ltd. and the Pacific Western Oil Company, lessees under the said oil and gas lease serial number Sacramento 019438(d), and their predecessors in interest, were in the lawful possession of the lands described in the plaintiff's amended complaint from May 28, 1921, until April 1, 1931.

The possession of said land was delivered to the Kettleman North Dome Association on April 1, 1931, under and by virtue of the terms of the Kettleman North Dome Unit Agreement, which agreement was approved by the Secretary of the Interior of the United States on January 31, 1931.

XI.

The defendants Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, Kettleman North Dome Association, Frank Kennedy and Franklin R. Kenney are entitled to a decree that the complainant take nothing by his amended bill of complaint herein and that he pay to the defendants, and each of them, their costs to be taxed.

Done at Los Angeles this 17th day of November, 1934.

Paul J. McCormick
United States District Judge.

[Endorsed]: Filed Nov. 17, 1934 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

JEAN BOURDIEU, Complainant, vs. PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, THOMAS M. CRUM, FRANK KENNEDY, C. G. SMITH, FRANKLIN R. KENNEY, OLEN LANE, M. H. GOODE, ROY E. COLLOM, JOHN DOE, JOHN DOE ONE, JOHN DOE TWO, JANE DOE, Defendants.	)	No. D-14-M. In Equity.

DECREE

This cause came on to be heard on October 19, 1933, before the Honorable Paul J. McCormick, Judge of the United States District Court for the Southern District of California, and was argued by counsel; and thereupon, on consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows, viz:

1. At and prior to March 6, 1919, those certain lands situated in the County of Fresno, State of California, and more particularly described as follows, to wit:

Lots One (1) and Two (2), the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section Thirty (30), Township Twenty-one (21) South, Range Seventeen (17) East, Mt. Diablo Base and Meridian,

had been and on that date they were withdrawn from entry as petroleum lands and were also classified as such by an Executive Order of Withdrawal dated December 30, 1910; and Complainant could not and did not by his homestead entry filed in the United States Land Office at Visalia, California, on March 6, 1919, or by any act subsequent thereto in connection with the perfection of his said entry, or by the patent thereafter issued to him, establish a preference right to a permit to prospect for oil and gas under the Leasing Act of February 25, 1920 (41 Stat. 437), or a right to an oil and gas lease under said act in case of discovery of oil or gas.

2. The homestead entry filed by Complainant in the United States Land Office at Visalia, California, on March 6, 1919, stated that it was made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914, 38 Statutes at Large, 509, and it was made with a view of obtaining title to the lands therein described with a reservation to the United States of the oil and gas on account of which the lands embraced therein were withdrawn and classified by the said Executive Order of Withdrawal dated December 30, 1910; and the lands embraced in the said entry and in the Complainant's patent therefor having been withdrawn as petroleum lands

by the said Executive Withdrawal Order of December 30, 1910, the Complainant never had a preference right to a prospecting permit upon or with respect to the said lands or any thereof under the said Leasing Act of February 25, 1920, or at all; and the Complainant is not now and he has never been entitled to a preference right to prospect for oil or gas upon or in the said lands, or any thereof, embraced within his said entry or within his said patent therefor, and he is not and never has been entitled to a lease over, on, or covering the said lands or any thereof for oil or gas or oil and gas purposes in case of discovery of oil or gas therein. The Complainant never was entitled to notice of the intention of Thomas M. Crum to apply for, or of the application of the said Thomas M. Crum for, a prospecting permit to explore for oil and minerals on or in Section 30, Township 21 South, Range 17 East, Mt. Diablo Base and Meridian, or in any part thereof.

The said Complainant has not and never has had any title to or any right whatsoever in or to the oil or gas in the said lands or any thereof, or any right to prospect for, mine or remove deposits of oil or gas therefrom, or any right to any of the proceeds from the oil or gas produced or to be produced from the said lands.

3. Defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company are the owners and holders, in the proportions of an undivided one-half (1/2) thereof to each, of that certain oil and gas lease dated October 4, 1929, by and between the United States of America, as lessor, and said Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company, as lessees, (Land Office and Serial No. Sacramento 019438 (d)) over, on

and covering the Northeast Quarter (NE¼) of Section Twenty (20), Lots One (1) and Two (2), the East Half (E½) of the Northwest Quarter (NW¼) and the Northeast Quarter (NE¼) of Section Thirty (30), all in Township Twenty-one (21) South, Range Seventeen (17) East, Mt. Diablo Base and Meridian, Fresno County, State of California, and of the estate for years in the said oil and gas lease, subject, however, to such rights therein or thereto as may exist in the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association.

4. The defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company, as lessees under said oil and gas lease described in paragraph 3 of this Decree. and their predecessors in interest, were in the lawful possession of the lands described in paragraph 1 of this Decree from May 28, 1921, until April 1, 1931. The possession of said lands was delivered to defendant Kettleman North Dome Association on April 1, 1931, under and by virtue of the terms of the Kettleman North Dome Unit Agreement, which agreement was approved by the Secretary of the Interior of the United States on January 31, 1931; and ever since April 1, 1931, the said Kettleman North Dome Association has been and it now is in lawful possession of said lands and operating them under the terms of the said Kettleman North Dome Unit Agreement.

5. Whatever the laims of the defendants Frank Kennedy, Franklin R. Kenney and Kettleman North Dome Association in or to the lands and premises described in paragraph 1 of this Decree, or in or to the said oil and gas lease described in paragraph 3 of this Decree, the said claims are not and they have never been without right as

against the Complainant and none of them is subject or subservient to the claimed rights of Complainant.

6. The Complainant has been and is guilty of gross laches in the assertion of his claim.

7. There was no fraud upon the part of defendants Kettleman Oil Corporation, Ltd., Pacific Western Oil Company, Kettleman North Dome Association, Frank Kennedy, and Franklin R. Kenney, or any of them, in connection with any matter or thing pertaining to Complainant's claim; and there was no fiduciary relationship at any time existing between Complainant and said defendants, or any of them. None of the defendants, either alone or in combination, or otherwise or at all, holds the oil and gas lease, or any part thereof or any interest therein, described in paragraph 3 of this Decree in trust for Complainant. The Complainant is not entitled to compel defendants Kettleman Oil Corporation, Ltd. and Pacific Western Oil Company, or either of them, or Kettleman North Dome Association or any other defendant or defendants herein, to transfer to him said lease or any interest therein, described in paragraph 3 of this Decree, or to deliver possession of the said lands or any part thereof described in paragraph 1 of this Decree, for the purpose of operating them for the production of oil, gas or other hydrocarbons, or for any purpose whatsoever or at all.

8. Complainant shall take nothing by his said Bill of complaint.

9. The defendants, and each of them, shall have and recover of and from the Complainant their costs herein laid out and expended, to be taxed by the Clerk of this Court.

DONE AT LOS ANGELES, CALIFORNIA, this 6th day of December, 1934.

Paul J. McCormick
United States District Judge.

The proposed decree in the above entitled suit of Bourdieu vs. Pacific Western Oil Company, et al. as submitted, is approved in form with the exception that it is respectfully submitted that the first word "petroleum" at the top of page 2 should be struck, and the word "mineral" substituted therefor, in order to be consistent with the decision of the court heretofore rendered, with the findings of fact as approved and with the exact language of Section 20 of the Leasing Act, which is being construed.

There is no question, as a matter of law, that petroleum is mineral but the use of the word "mineral" would remove any controversy on the subject.

With the above exception the proposed decree is approved as to form, as provided in Rule 44.

CHANDLER, WRIGHT & WARD
By A B Dorman
Solicitors for Complainant.

Objection overruled

Paul J. McCormick
Judge

Decree entered and recorded Dec. 6-1934.
R. S. Zimmerman, Clerk
By B. B. Hansen, Deputy Clerk.

[Endorsed]: Filed Dec. 6, 1934 R. S. Zimmerman Clerk By B. B. Hansen Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

JEAN BOURDIEU, Complainant, -vs- PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, THOMAS M. CRUM, FRANK KENNEDY, C. G. SMITH, FRANKLIN R. KENNEY, OLEN LANE, M. H. GOODE, ROY E. COLLOM, JOHN DOE, JOHN DOE ONE, JOHN DOE TWO, JANE DOE, Defendants.	No. D-14-M IN EQUITY. PETITION FOR ORDER ALLOWING APPEAL.

TO THE HONORABLE, PAUL J. McCORMICK, DISTRICT JUDGE FOR THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

The above named Complainant, JEAN BOURDIEU, feeling himself aggrieved by the decree made and entered in this cause on the 6th day of December, 1934,

does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California.

Your Petitioner further prays that the proper order touching the security to be required of him to perfect this appeal, be made.

CHANDLER, WRIGHT & WARD

By A. B. Dorman

And A. B. Dorman

Solicitors for Complainant.

[Endorsed]: Filed Feb 12, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS

And now on this 11th day of February, A. D., 1935, came the Complainant, JEAN BOURDIEU, by his solicitors, Chandler, Wright & Ward and A. B. Dorman, and says that the decree entered in the above cause on the 6th day of December, 1934, is erroneous and unjust to complainant, and complainant assigns the following errors to all of which rulings of the court the complainant duly excepted:

FIRST: The Court erred in failing to find that in 1882 the Surveyor's Return of the original survey showed the land in this suit was non-mineral in character; that since said date until subsequent to March 6, 1919, when complainant entered the land as his homestead, no contest nor protest was ever filed in the United States Land Office challenging the agricultural character of the land here involved.

SECOND: The Court erred in failing to find that on June 17, 1908, the land involved herein was classified as agricultural land by the Director of the Geological Survey, and this classification was confirmed by the Secretary of the Interior; that it thereupon was excluded from lands "classified as mineral and then withdrawn as mineral" in accordance with the mineral land laws.

THIRD: The Court erred in failing to find that there is no official record of any classification as mineral of the

land herein other than may be contained as a matter of law in the order of December 30, 1910, when it was "reserved for classification", and subsequent to this order no classification as mineral has been made.

FOURTH: The Court erred in admitting testimony of defendants' witness, in answer to the question of whether or not complainant's land was classified on December 28, 1910, in that this testimony was not the best evidence and called for a conclusion of the witness.

FIFTH: The Court erred in finding in paragraph 4 of its Findings of Fact that, "and the said oil section then and there classified the said lands as oil and gas lands."

SIXTH: The Court erred in its conclusion that the lands affected by the order of December 30, 1910 were classified as mineral by virtue of that order.

SEVENTH: The Court erred in its conclusion that the land herein was withdrawn as mineral by the order of December 30, 1910, in that this finding rejects the statutory test of land known to be valuable for mineral to constitute a withdrawal as mineral, and substitutes therefor a "popular meaning" unauthorized by law.

EIGHTH: The Court erred in its Findings of Fact and Conclusions of Law (paragraph 6, line 20) in failing to insert after the word "classified" the phrase "or reported as valuable".

NINTH: The Court erred in its conclusion that although complainant made entry on the land herein in good faith as agricultural, he must have done so under a belief that he would receive title to the mineral deposits, in order to receive a preference right.

TENTH: The Court erred in its decree in declaring that complainant was not entitled to personal notice of the intention of Thomas M. Crum to apply for prospecting permit to explore for minerals on land described in paragraph 1 of the decree.

ELEVENTH: The Court erred in finding in paragraph 13 of its Findings of Fact that no fraud was practiced or attempted to be practiced upon complainant herein, and in failing to add "except insofar as this may be shown by defendants' failure to serve personal notice of intention to apply for permit."

TWELFTH: The Court erred in its decree in declaring that defendants were in the lawful possession of the land described in paragraph 1 of the decree from May 28, 1921 until April 1, 1931, and thereafter.

THIRTEENTH: The Court erred in admitting evidence consisting of defendants' Exhibits "O" and "P", and the statement of expenditures of defendants (made by Mr. Clark, under stipulation as coming from a witness) or any of them, over complainant's objection for the purpose of proving laches.

FOURTEENTH: The Court erred in its decree in declaring that complainant was guilty of laches and in finding that each of the defendants is entitled to invoke the doctrine of laches as a defense.

FIFTEENTH: The Court erred in refusing to adopt each and all of the findings of fact requested by complainant.

SIXTEENTH: The decree is contrary to law.

SEVENTEENTH: The Court erred in its decree dismissing complainant's bill, in failing to declare the defendants trustees for complainant as to that proportionate interest in the lease herein represented by the land owned by complainant and described in paragraph 1 of the decree.

WHEREFORE, complainant prays that said decree be reversed and the District Court be instructed to enter such decree as is prayed for by said bill, declaring the defendants trustees for complainant as to the leasehold rights in the lands described in paragraph 1 of the decree.

CHANDLER, WRIGHT & WARD
and A. B. DORMAN,

By A B Dorman
Solicitors for Complainant

[Endorsed]: Filed Feb 12, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ORDER

On this 11th day of February, 1935 came on to be heard the application of JEAN BOURDIEU, the above named complainant, said complainant being represented by counsel, for an appeal, and it appearing to the court from the petition filed herein, that the application ought to be granted, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decision and decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, decision, findings and decree and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed in the sum of $1,000.00, the same to act as a bond for all costs on appeal.

Said complainant now tenders his bond on appeal with good and sufficient surety thereon, which bond is by the court approved and ordered filed.

Wm. P. James
JUDGE of the United States District Court.

Paul J. McCormick
United States District Judge.

[Endorsed]: Filed Feb 12, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, JEAN BOURDIEU, as principal, and the FIDELITY & CASUALTY COMPANY OF NEW YORK, as Surety, acknowledge ourselves to be jointly indebted to Pacific Western Oil Company, a corporation, Kettleman Oil Corporation, a corporation, Kettleman North Dome Association, a corporation, Thomas M. Crum, Frank Kennedy, C. G. Smith, Franklin R. Kenney, Olen Lane, M. H. Goode, Roy E. Collom, Appellees in the above cause, in the sum of One Thousand Dollars ($1000.00), conditioned that, whereas on the 6th day of December, A. D. 1934, in the District Court of the United States for the Southern District of California, Northern Division, in a suit pending in that Court, wherein Jean Bourdieu was complainant and the above named Appellees were defendants, numbered on the Equity Docket as D-14-M, a decree was rendered against the said Jean Bourdieu, and the said Jean Bourdieu, having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said defendants, citing and admonishing them to be and appear at a session of the

United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco in the State of California on the 11th day of F, A. D. 1935 next.

Now, if the said Jean Bourdieu shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Jean Bourdieu

[Seal] FIDELITY & CASUALTY COMPANY OF NEW YORK

By William E. Fortney

Attorney.

The above bond approved this 11 day of February, 1935.

Wm. P. James

JUDGE

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

On this 9th day of February in the year One Thousand Nine Hundred and thirty five before me Paul J. Emme a Notary Public in and for said County of Los Angeles residing therein, duly commissioned and sworn, personally appeared William E. Fortney known to me to be the ATTORNEY of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above written.

[Seal] Paul J. Emme

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 12, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record, the following and no other papers or exhibits, to-wit:

1—Bill of Complaint.

2—Amendment to Bill of Complaint inserting new paragraphs containing stipulation of Judicial Notice, of Nov. 9, 1931.

3—Answer of defendants, Kettleman Oil Corporation and Pacific Western Oil Company.

4—Appellant's condensed statement of evidence.

5—Memorandum of decision dated October 1, 1934.

6—Complainant's proposed findings of fact.

7—Findings of fact and conclusions of law made by the court.

8—Decree of December 6, 1934.

9—Petition for appeal.

10—Assignment of errors.

11—Order allowing appeal.

12—Bond for costs on appeal.

13—Citation in appeal with proof of service.

14—Praecipe for transcript of record.

CHANDLER, WRIGHT & WARD

By A. B. Dorman

Solicitors for Complainant.

[Endorsed]: Filed Feb 25, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF ADDITIONAL PORTIONS OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are requested by the undersigned to include in the transcript of the record to be filed by complainant herein in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause, the following additional papers or exhibits in addition to those specified in the Praecipe for Transcript on Appeal filed by counsel for complainant, to wit:

1. Answer of defendant Franklin R. Kenney to Amended Bill of Complaint, filed December 21, 1932;

2. Answer of defendant Frank Kennedy to Amended Bill of Complaint, filed December 20, 1932;

3. Stipulation that defendant Kettleman North Dome Association may adopt part or all of the answers of defendants Pacific Western Oil Company and/or Kettleman Oil Corporation, Ltd., or portions of the cross-complaints thereof, as the answer of defendant Kettleman North Dome Association, filed December 23, 1932;

4. Answer of defendant Kettleman North Dome Association to Amended Bill of Complaint, filed December 23, 1932;

5. This Praecipe for Transcript of Additional Portions of Record.

Herbert W. Clark
Morrison, Hohfeld, Foerster, Shuman & Clark
Solicitors for Pacific Western Oil Company.

Felix T. Smith
Pillsbury, Madison & Sutro
Herbert W. Clark
Morrison, Hohfeld, Foerster, Shuman & Clark
Solicitors for Kettleman Oil Corporation.

George W. Nilsson
Solicitor for Kettleman North Dome Association.

Herman Phleger
Brobeck, Phleger & Harrison
Solicitors for Frank Kennedy.

W. J. Kenney
Orrick, Palmer & Dahlquist
Solicitors for Franklin R. Kenney.

[Endorsed]: Filed Mar 4-1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 345 pages, numbered from 1 to 345 inclusive, together with Volume II Book of Exhibits, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; amendment to bill of complaint; minute order of November 9, 1931, on hearing on motions to dismiss; minute order of October 20, 1932, denying motions to dismiss; answer of defendant, Pacific Western Oil Company, a corporation; stipulation omitting answer of Kettleman Oil Corporation; answer of defendant Kettleman North Dome Association; answer of defendant Frank Kennedy; answer of defendant Franklin R. Kenney; statement of evidence; minute order of October 1, 1934, ordering findings and decree for defendants; memorandum of decision; proposed findings of fact submitted by complainant; findings of fact; decree; petition for appeal; assignment of errors; order allowing appeal; bond on appeal; praecipe, and additional praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $467.50 and that said amount has been paid the prin-

ter by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $52.55 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 19th day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Fifty-ninth.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Edmund L. Smith,

Deputy.

No. 7808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JEAN BOURDIEU,

Appellant,

vs.

PACIFIC WESTERN OIL COMPANY, a Corporation, KETTLEMAN OIL CORPORATION, a Corporation, KETTLEMAN NORTH DOME ASSOCIATION, a Corporation, FRANK KENNEDY, FRANKLIN R. KENNEY and THOMAS M. CRUM,

Appellees,

C. G. SMITH, et al.,

Defendants.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Title of Court and Cause.]

NOTICE OF MOTION

To JEAN BOURDIEU, Complainant and Appellant in the above entitled suit, and to CHANDLER, WRIGHT & WARD, H. W. WRIGHT, and A. B. DORMAN, Van Nuys Building, 210 West Seventh Street, Los Angeles, California, Solicitors for said Complainant and Appellant:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on October 28th, 1935, in the courtroom of the Circuit Court of Appeals for the Ninth Circuit, in the Post Office Building in the City and County of San Francisco, State of California, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned appellees will call up for hearing their motion for diminution of record, a copy of which is hereto attached and herewith served upon you, and will move the said court for its order thereon.

Dated: San Francisco, October 24, 1935.

HERBERT W. CLARK,
FELIX T. SMITH,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
PILLSBURY, MADISON & SUTRO,
Solicitors for Pacific Western Oil Company and Kettleman Oil Corporation, Ltd.

GEORGE W. NILSSON,
Solicitor for Kettleman North Dome Association.

HERMAN PHLEGER,
BROBECK, PHLEGER & HARRISON,
Solicitors for Frank Kennedy.

In the interest of dispatch it is ORDERED that this Notice of Motion and the attached Motion for Diminution of Record may be served on the solicitors for the Complainant and Appellant in the above entitled suit at least three days (instead of five days as provided by rule) before the date noticed therein for hearing.

CURTIS D. WILBUR,
Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

MOTION BY APPELLEES FOR DIMINUTION OF RECORD.

Come now the appellees (defendants below) PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, and FRANK KENNEDY, and suggest diminution of the record in this case as follows:

(1) The transcript of record now on file in this court is incomplete in that the motion to dismiss, filed by the said Pacific Western Oil Company and Kettleman Oil Corporation, the motion to dismiss, filed by said Kettleman North Dome Association, and the motion to dismiss, filed by the said Frank Kennedy, were omitted therefrom.

(2) These appellees and applicants show the court that this is an equity suit which was origi-

nally tried in the United States District Court for the Southern District of California, Northern Division; that neither the praecipe for transcript on appeal nor the praecipe for transcript of additional portions of record filed with the Clerk of the said District Court for the purpose of obtaining a transcript of the record in said suit for the purpose of appeal to this court, calls for the inclusion of the said motions to dismiss, or any of them, in the said transcript to be forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, but that there is included in the transcript forwarded to and now on file with the Clerk of this court an order of the said District Court denying the said motions and each of them (Transcript pp. 21, 22); that by inadvertency and error, and acting under the erroneous belief that inasmuch as the said order denying the said motions was to be incorporated in the said transcript the motions themselves would be likewise incorporated therein, Herbert W. Clark, Esq., who was in charge of the preparation of the said record on appeal for those moving appellees, omitted to specify in any praecipe that the said motions and each of them should be included in the said transcript, and, therefore, the Clerk of the said District Court did not include in the transcript forwarded to the Clerk of this court the said motions or any of them; that the omission of the said motions from the said transcript was not noticed by or drawn to the attention of counsel for these moving appellees until the 23rd day of Octo-

ber, 1935, when counsel for said Pacific Western Oil Company and Kettleman Oil Corporation began the dictation of Point Seven of the brief on appeal of the above named appellees, which point is the point that the United States of America is an indispensably necessary party herein.

(3) The said omitted portions of the said transcript of record were at once prepared and certified by the Clerk of the aforesaid District Court and they are attached to this motion and are herewith respectfully tendered. There is also attached to this motion the affidavit of Herbert W. Clark, Esq., in support hereof.

Dated: October 24, 1935.

HERBERT W. CLARK,
FELIX T. SMITH,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
PILLSBURY, MADISON & SUTRO,
Solicitors for Pacific Western Oil Company and Kettleman Oil Corporation.

GEORGE W. NILSSON,
Solicitor for Kettleman North Dome Association.

HERMAN PHLEGER,
BROBECK, PHLEGER & HARRISON,
Solicitors for Frank Kennedy.

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR DIMINUTION OF RECORD

United States of America,
State of California,
City and County of San Francisco.—ss.

HERBERT W. CLARK, being first duly sworn, deposes and says:

He is and at all times herein mentioned was one of the solicitors for Pacific Western Oil Company and Kettleman Oil Corporation, Ltd., defendants and appellees in the above entitled suit, and on behalf of all defendants and appellees was in charge of supervising the preparation of the transcript of record on appeal therein; that he inadvertently and erroneously omitted to call in any praecipe for the inclusion in said transcript of the motions to dismiss above mentioned, or any of them, and did not notice that neither the praecipe for transcript on appeal nor the praecipe for transcript of additional portions of record omitted to call for the inclusion of said motions in the transcript of record; that the omission of said motions from the said transcript was not noticed by this affiant until October 23rd, 1935, during the time he was preparing to dictate Point Seven of the Appellees' Brief herein, but having known that the order of the said District Court denying said motions had been and was included in the said transcript, this affiant, without examining the transcript further in connection with

the said order or the said motions, erroneously assumed that the motions had been included.

Immediately upon discovery of the fact that the above mentioned motions had been omitted from the said transcript of record as aforesaid, this affiant arranged by telephone to have certified copies thereof made by the Clerk of the United States District Court for the Southern District of California, Northern Division. A copy of this motion and of this affidavit in support thereof will be served by mail on the solicitors for the appellant in the above entitled suit.

HERBERT W. CLARK

Subscribed and sworn to before me this 24th day of October, 1935.

[Seal] W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

In the District Court of the United States, for the Southern District of California, Northern Division.

No. D-14-M. In Equity.

JEAN BOURDIEU,

Complainant,

vs.

PACIFIC WESTERN OIL COMPANY, a corporation, KETTLEMAN OIL CORPORATION, a corporation, KETTLEMAN NORTH DOME ASSOCIATION, a corporation, THOMAS M. CRUM, FRANK KENNEDY, C. G. SMITH, FRANKLIN R. KENNEY, OLEN LANE, M. H. GOODE, ROY E. COLLOM, JOHN DOE, JOHN DOE ONE, JOHN DOE TWO, JANE DOE,

Defendants.

MOTION TO DISMISS

Come now the defendants, PACIFIC WESTERN OIL COMPANY, a corporation, and KETTLEMAN OIL CORPORATION, a corporation, and severally move the court to dismiss the above entitled suit on the following grounds:

First: The bill of complaint herein does not state facts sufficient to constitute a valid cause of action in equity or at law against the defendants herein, or either or any of them.

Second: There is a defect of parties to the said suit in that the United States of America is not either a party plaintiff or a party defendant, although the bill of complaint shows on its face that the United States of America is an indispensable party to a complete determination of the suit and action.

Third: It appears on the face of the bill of complaint herein that the plaintiff's cause of complaint is stale, and that it would be contrary to equity and good conscience for this court to take cognizance thereof, and that the plaintiff's laches and delay are not excused by the matter set up in paragraphs VI, IX, and X of the bill of complaint, or elsewhere in the said bill of complaint.

WHEREFORE, the premises considered, these moving defendants severally pray that the plaintiff may take nothing by his said bill of complaint herein, and that they and each of them may be hence dismissed with their respective costs in this behalf sustained.

FELIX T. SMITH
PILLSBURY, MADISON & SUTRO
HERBERT W. CLARK
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
Solicitors for Pacific Western Oil Company and Kettleman Oil Corporation.

[Endorsement]: Received a copy of the within Notice of Motion, Motion to Dismiss, and Memoran-

dum of Points and Authorities in Support of Motion to Dismiss, this 25 day of September, 1931.

CHANDLER, WRIGHT & WARD
and
A. B. DORMAN
Solicitors for Plaintiff.

[Endorsed]: Filed Oct. 2, 1931. R. S. Zimmerman, Clerk, by Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

MOTION TO DISMISS OF DEFENDANT FRANK KENNEDY.

Defendant Frank Kennedy moves the court to dismiss the above entitled suit and bill of complaint filed herein upon the following grounds:

I.

Said bill of complaint does not state any matter of equity entitling the plaintiff to the relief prayed for and does not state facts sufficient to constitute a valid cause of action in equity or in law against this defendant.

II.

There is a defect of parties to the said suit in that neither the United States of America nor the proper executive officers thereof are either parties plaintiff or parties defendant, although the bill of complaint shows on its face that the United States of America and such proper executive officers are

indispensable parties to a complete determination of the suit and action.

III.

Said bill of complaint shows on its face that plaintiff's alleged cause of complaint is barred by acquiescence, delay and laches.

IV.

The above entitled court is without jurisdiction of the subject matter of the cause.

WHEREFORE, this defendant prays judgment of this court that said plaintiff take nothing by his said bill of complaint herein; that said bill of complaint be dismissed as against this defendant, and that this defendant have his costs of suit herein incurred.

BROBECK, PHLEGER & HARRISON
Attorneys for defendant Frank Kennedy.

[Endorsed]: Filed Oct. 7, 1931. R. S. Zimmerman Clerk, by Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

MOTION TO DISMISS.

Comes now the defendant, KETTLEMAN NORTH DOME ASSOCIATION, a California non-profit corporation, and on its own behalf moves the

court to dismiss the above entitled suit, on the following grounds:

First: The bill of complaint herein does not state facts sufficient to constitute a valid cause of action in equity or at law against this defendant.

Second: There is a defect of parties to the said suit in that the United States of America is not either a party plaintiff or a party defendant, although the bill of complaint shows on its face that the United States of America is an indispensable party to a complete determination of the suit and action.

Third: It appears on the face of the bill of complaint herein that the plaintiff's cause of complaint is stale, and that it would be contrary to equity and good conscience for this court to take cognizance thereof, and that the plaintiff's laches and delay are not excused by the matter set up in paragraphs VI, IX, and X of the bill of complaint, or elsewhere in the said bill of complaint.

WHEREFORE, the premises considered, this moving defendant prays that the plaintiff may take nothing by his said bill of complaint herein, and that it may be hence dismissed with its costs in this behalf sustained.

GEORGE W. NILSSON,
Solicitor for Kettleman North Dome Association.

Points and Authorities:

In support of its motion to dismiss KETTLEMAN NORTH DOME ASSOCIATION adopts the

points and authorities heretofore filed by the defendants, Pacific Western Oil Company and Kettleman Oil Corporation in support of their motion to dismiss.

GEORGE W. NILSSON,
Solicitor for Kettleman North Dome Association.

(Endorsement):

Received copy of the within Notice this 9th day of October, 1931.

CHANDLER, WRIGHT & WARD,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 9, 1931. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of Court.]

United States of America,
Southern District of California—ss:

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California do hereby certify that the foregoing is a full, true, and correct copy of Motion of Pacific Western Oil Company and Kettleman Oil Corporation, to Dismiss the Complaint, filed on October 2, 1931; Motion of Defendant, Frank Kennedy, to Dismiss the Complaint, filed on October 7, 1931, and Motion of Kettleman North Dome Association, to Dismiss the Complaint, filed on October 9, 1931, in

the cause entitled: JEAN BOURDIEU, vs. PACIFIC WESTERN OIL COMPANY, etc., et al., No. D-14-M, In Equity, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court, this 23rd day of October, A. D. 1935.

[Seal] R. S. ZIMMERMAN,
Clerk.
By Edmund L. Smith,
Deputy Clerk.

[Endorsed]: United States Circuit Court of Appeals. Filed Oct. 24, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Monday, October 28, 1935.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED motion of appellees for certiorari for diminution of record and cause on merits argued by Messrs. A. B. Dorman and H. W. Wright, counsel for appellant, and by Mr. Herbert W. Clark, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from proceedings of Friday, December 20, 1935.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Before: WILBUR, MATHEWS and HANEY, Circuit Judges.

HANEY, Circuit Judge:

On October 24, 1935, appellees filed herein a motion suggesting diminution of the record for the purpose of presenting to this court the motions to

dismiss made below by appellees, Pacific Western Oil Company, a corporation, Kettleman Oil Company, a corporation, Frank Kennedy, and Kettleman North Dome Association, a corporation, the said motions to dismiss are necessary to a fair consideration of this case and the motion for diminution of the record is hereby allowed.

Complainant has appealed from an adverse decree in a suit wherein he asked that one of the defendants be adjudged to be holding an oil lease in trust for complainant, and for an accounting of the proceeds derived from the lease, premises covered by the lease, or the permit upon which the lease was based. The lease in controversy covered 322.89 acres of land in Fresno County, California.

The evidence shows that a government surveyor's field notes, prepared August 19, 1882, with respect to certain land, including the land involved herein, recited in part:

> "Township 21 S. Range 17 E. is very broken and mountainous and is used by the settlers for sheep husbandry and affords ample pasturage for thousands of sheep in the spring time, but, owing to its scarcity of water, is not used much in summer. Greasewood, sage and bunch grass abounds. Minerals have not been found."

At the time of the trial, it was stipulated by counsel that the deputy surveyor making the report contained in the field notes set out above, said the lands were agricultural lands in 1882 and that no minerals had been discovered.

The evidence also shows that Ralph Arnold in 1907, then employed by the United States Geological Survey was engaged in mapping all lands which appeared to have oil possibilities in and around the vicinity of the land involved in this suit. After a conference had with the Secretary of the Interior in 1907, Arnold recommended that a large amount of land, including the land in question, be withdrawn from homestead entry; pending investigation. The Acting Secretary of the Interior directed the Commissioner of the General Land Office to withdraw certain lands described including the land in question here. Accordingly, an order was made on August 21, 1907, directed to the registers and receivers of appropriate land offices withdrawing such lands, including those in question here, as follows:

> "By direction of the Acting Secretary of the Interior, dated August 15, 1907, the lands embraced in the attached list, situated in Fresno and Kings Counties, are temporarily withdrawn from agricultural entry pending an investigation of the character thereof by the Geological Survey. You will note the withdrawals on your records and thereafter accept no agricultural entries or filings thereof until further advised by this office."

Thereafter on June 17, 1908, the Director of the United States Geological Survey wrote to the Commissioner of the General Land Office stating that he

was enclosing a list of lands "which have been classified as mineral lands by the geologists of this Bureau". In this letter it is stated:

> "It is therefore requested that the lands mentioned in the accompanying list be withdrawn from any but mineral land entry. It is believed that all of the other lands * * * are non-mineral bearing in so far as petroleum is concerned."

The land involved in this suit was not thus classified as mineral land.

On July 10, 1908, the Acting Commissioner of the General Land Office wrote to the Register and Receiver, in whose jurisdiction the lands described in the preceding letter were located, in part as follows:

> "I am * * * in receipt of a report dated June 17, 1908, from the Director of the Geological Survey, in which the lands described in the list hereto attached are classified as oil lands. You will note this classification on your records * * *
>
> "The remainder of the lands withdrawn by said letters * * * and not hereby classified * * * are restored to filing and entry under the general land laws * *"

The various factors surrounding and leading up to the withdrawal order of September 27, 1909, were related by defendants' witness, Edward C. Finney, who had been continuously connected with the Interior Department from September 1, 1894, to April

17, 1933, with the exception of six months in 1911, as follows:

> "Prior to September 27, 1909, it had been the practice of the Department to classify lands for the purpose of disposition. In other words, it was the duty of the Secretary of the Interior to dispose of coal lands only under what were known as the coal land laws; and the same with placer oil and mineral, which were disposable only under the placer mining laws. If it was desert land, non-mineral in character, it was subject to entry under the desert land laws. So that it had been the practice of the Department to make withdrawals from time to time for purposes of classification, in aid of proper disposition. For illustration, the statute with respect to coal lands, fixed a minimum price and withdrawal for coal classification was also for the purpose not only of determining whether it was coal or non-coal land, but if determined to be coal, to determine its content, and to fix what was deemed a proper price on the disposition of that mineral.
>
> "The old mining laws as to Placer oil or placer gold, fixed a flat price of $2.50 per acre, so that any withdrawal of lands of that type could only be for the purpose of classifying them as mineral or nonmineral. Along in 1909, and possibly in 1908, there was a change in policy discussed, and in 1909 actually adopted by the President and by the Secretary of the

> Interior. It was felt that the coal laws were inadequate and inappropriate and too limited to fit coal. It was felt that the Placer mining laws were inadequate for the disposition of oil and gas, and possibly potash, nitrates and asphaltic minerals, for several reasons; the acreage which might be taken was too limited for a large and expensive operation, and the government had no control whatever after patent issued, and in order to prevent waste or regulate the drilling of wells, a sentiment grew up, and was advocated by prominent men in the government, for a change in the law from a sales act to a leasing act. * * *"

The withdrawal order of September 27, 1909, signed by President Taft temporarily withdrew more than three million acres of land, including that in controversy here, "from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws." This order was by order of President Taft, ratified, confirmed and continued by an order of July 2, 1910.

The Pickett Act (Act of June 25, 1910, 36 Stat. 847) provided:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of

withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

The Land Classification Board, Oil Section, of the United States Geological Survey, on December 27, 1910, considered evidence relating to the character of certain lands, including the land in question herein. Whether or not the board classified the lands in question is in dispute. Appellant introduced a letter dated July 17, 1931, from the Acting Director of the Geological Survey, in regard to the land here in question saying that "subsequent to order of withdrawal on December 30, 1910, Petroleum Reserve 16, California, No. 7, the Geological Survey has not made a formal mineral classification of this section." On the other hand, appellees introduced evidence that the file containing the minutes of this meeting had been lost, and then introduced over appellant's objection evidence of Max W. Ball who was then a member of the Oil Section and who participated in the meeting to the effect that the land in question was classified by said Oil Section at that time as oil and gas land.

On the following day, the Acting Director of the Geological Survey wrote the Secretary of the Interior that information received from the field indicated that certain lands, including the land in question, were valuable, for oil, and recommended the submission of an order of withdrawal to the President for appropriate action. The next day such or-

der was submitted to the President by the Acting Secretary of the Interior with the latter's recommendation.

On December 30, 1910, President Taft affixed his signature to the order of withdrawal, which described 18,480 acres, and included the land in question, which order is described as "Petroleum Reserve No. 16—California No. 7" and is in part as follows:

> "It is hereby ordered that the following described lands be and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States * * *"
>
> "The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,-986 acres."

The enabling or separation act of July 17, 1914 (30 USCA 371, §121) provided in part:

> "Lands withdrawn or classified as * * * oil, gas, or asphaltic minerals, or which are valuable for those deposits shall be subject to * * * entry * * * under the non-mineral land laws of the United States, whenever such * * * entry * * * shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of

> which the lands were withdrawn or classified or reported as valuable * * *"

This act (30 USCA 372, §122) also provided for the issuance of a patent containing the reservation of mineral rights; provided for entry on the land by one who had acquired from the United States the title or right to mine and remove the reserved deposits, and further provided:

> "* * * Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to * * * enter * * * under the land laws of the United States, lands which have been withdrawn or classified as * * * oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation * * *"

On March 6, 1919, appellant filed his homestead entry pursuant to the Act of February 19, 1909 (43 USCA 214, §218 et seq.), which provided that the application was made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914, from which we have just quoted.

The Leasing Act of February 25, 1920 (30 USCA 398, §221 et seq.), provided for the issuance of a prospecting permit, by the Secretary of the Interior "under such necessary and proper rules and regulations as he may prescribe" and for the issuance of a lease covering the lands described in the permit upon certain conditions. Section 20 of this act (30 USCA, §229) provides:

> "In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry * * * the entryman * * * if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery * * *"

By Section 32 of this act (30 USCA 388, §189) the Secretary of the Interior was authorized to prescribe necessary and proper rules and regulations to carry out the provisions of the above quoted section.

On March 11, 1920 certain rules were promulgated by the Secretary of the Interior (47 L. D. 437), and it was provided in Rule 12 (a) [47 L. D. 437, 444]:

> "Should an application for permit for entered or patented lands *with a reservation* of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is

> the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded."

Sometime prior to May 28, 1921, defendant Crum made application for an Oil and Gas Prospecting Permit covering certain lands, including those owned by appellant. This defendant was called as a witness on behalf of complainant and testified as follows:

> "At the time that I made application for this permit, I did not serve notice in writing upon Jean Bourdieu informing him that I intended to make application for permit to prospect on the lands involved in this action. I did not give Mr. Bourdieu any notice at any time nor did I file any evidence of notice with the Department."

On May 29, 1921, the Secretary of the Interior issued the permit applied for which covered appellant's lands.

Complainant testified that a well was being drilled on land adjacent to his in the fall of 1924, and that he could see the drilling rig from his house.

On June 8, 1925, there was issued to complainant a Register's Final Certificate (Homestead) which provided:

> "Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat., 509) as to oil and gas."

On October 7, 1925, a patent to the lands involved herein was issued to complainant, the reservation clause in such patent providing:

> "* * * excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 * * *"

Complainant testified that not less than three years prior to 1928, he learned that he had a preference right for an oil and gas prospecting permit; that in July, 1928, he was told that the Crum permit covered his land; that in the winter of 1928 another well was being drilled in the immediate vicinity of his land.

In the meantime the Crum permit, by various conveyances was acquired by appellees Kettleman Oil Corporation, Ltd., and Pacific Western Oil Company, each of which owned an undivided one-half interest in said permit. On October 4, 1929, there was issued to these two corporations a Lease of Oil and Gas Lands, which covered appellant's land. Complainant testified that he first learned that such a lease had been issued covering his lands when he read it in the Coalinga paper in January, 1930.

On July 1, 1931, complainant filed his bill alleging his ownership in the land since filing his entry, his preference right, and that his entry was bona fide on the land as agricultural. He further alleged that the Crum permit was issued without notice to him, that the permit was conveyed by Crum to others, that he first learned of the issuance of the permit in July, 1928, and tendered to the parties holding the lease, the amount expended for assessments on the land, for drilling and exploring.

The relief asked in the bill of complaint in this case is that the decree declare that the lease is held by the owners thereof in trust for complainant; that such owners be required to convey said lease to complainant, and for an accounting.

The trial court held that since the withdrawal order of December 30, 1910, had not been revoked, the lands were both withdrawn from entry as being petroleum lands and classified as such, and therefore the provision for preference in the leasing act had no application, and complainant had no right of preference. It was also held that complainant's laches was a bar to the suit.

Appellant's contentions may be summarized as follows: First, that the lands were classified as agricultural by the surveyor in 1882, and again by the Geological Survey in 1908, that this agricultural character persists until its mineral character is determined, that the mineral character is not determined until it is known to contain valuable min-

eral deposits, and that the withdrawal order of December 30, 1910, did not amount to a contest or protest challenging the agricultural character of the land; Second, that appellant made a bona fide entry on the lands as an agricultural entry, and that the Leasing Act gives him a preference right for lands "reported as valuable", for the act gives a preference right except where the lands are withdrawn as mineral or classified as mineral; Third, that the Land Classification Board Oil Section, United States Geological Survey did not classify the land as mineral on December 27, 1910, as shown by the Director's letter of December 28, 1910; that the Withdrawal Order of December 30, 1910, did not classify the lands because the order states that they were merely reserved for classification, that the practice in the land office after such orders of withdrawal were made was to subsequently classify the lands withdrawn, that the decisions of the land office hold that a temporary withdrawal order does not classify the lands, and that in order to constitute a mineral classification, there must be a known value the controlling feature being "value" and not "kind"; Fourth, that the Order of Withdrawal of December 30, 1910, did not withdraw the lands as mineral because the lands could not be withdrawn as mineral until they had been classified as such, and since there was no evidence that the lands had a known mineral value, they were not classified; Fifth, that evidence of the member of the Land

Classification Board that the land was classified was not admissible, because the official bulletin of the Land Department showing what lands were classified and the letter of December 28, 1910 to the Secretary from the Director were the best evidence; that evidence introduced by appellees of expenditures made by them in developing the field near the vicinity of appellant's lands was inadmissible for the purpose of proving laches; Sixth that appellant was not guilty of laches.

The United States was not made a party to this suit, and it is conceded that the United States is the owner of the oil and gas deposits. It is shown that two of the appellees are lessees of the government, and by reason thereof have a permissive right to remove the oil and gas deposits. It is apparent therefore that neither the court below nor this court has jurisdiction of the subject matter of the suit, and therefore the motion to dismiss made by appellees in the court below should have been sustained.

In Bockfinger v. Foster, 190 U. S. 116, 126, 47 L. Ed. 975, 23 Sup. Ct. 836, it was said concerning Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264, and United States v. Schurz, 102 U. S. 402, 26 L. Ed. 173:

> "* * * But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation

> of Congress, so long as the title in any essential sense remains in the United States."

In Wilson v. Elk Coal Co., 7 F. (2d) 112, 113 [Certiorari denied 269 U. S. 587, 70 L. Ed. 426, 46 Sup. Ct. 203], this court, in a contest involving a preference right in coal lands, said:

> "It may be that the appellant had, and still has, a remedy by mandamus against the proper officer of the United States, to compel the issuance of a patent * * * But, be that as it may, we are clearly of opinion that the courts are without jurisdiction to grant relief in favor of one claiming only an equitable title, as against a party in possession under a lease from the United States, so long as the title remains in the United States * * *"

That case was followed by us in Proctor v. Painter, 15 F. (2d) 974.

Although in Skeen v. Lynch (CCA 10), 48 F. (2d) 1044, [Certiorari denied 284 U. S. 633, 76 L. Rf. 539, 52 Sup. Ct. 17] in the second cause of action relating to a preference right under the Leasing Act, the jurisdictional point was not raised, it was held with respect to that cause of the bill that the preference right given by the Leasing Act applied only to entries made without reservation of the mineral rights.

Since we have held that this court has no jurisdiction, we are unable to consider this and the related questions urged by appellants.

This suit and complainant's complaint must be DISMISSED, and it is so ordered.

[Endorsed]: Opinion. Filed Dec. 20, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 7808

JEAN BOURDIEU,

Appellant,

vs.

PACIFIC WESTERN OIL COMPANY, a corp., KETTLEMAN OIL CORP., a corp., KETTLEMAN NORTH DOME ASSOC., a corp., FRANK KENNEDY, FRANKLIN R. KENNEY, & THOMAS M. CRUM,

Appellees.

DECREE OF DISMISSAL.

APPEAL from the District Court of the United States for the Southern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Northern Division, and was duly submitted; and on motion of appellees for writ of certiorari for diminution of record,

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court,

that the said motion be, and hereby is granted, and that the appeal in this cause be, and hereby is, dismissed, with costs in favor of the appellees and against the appellant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Dec. 20, 1935. Paul P. O'Brien, Clerk.

[Title of Court]

Excerpt from proceedings of Monday, January 27, 1936.

Before: WILBUR, GARRECHT and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the petition of appellant, filed January 8, 1936, for a rehearing of above cause, and reply of appellees thereto, filed January 17, 1936, and good cause therefor appearing, and by direction of the court, IT IS ORDERED that the petition of appellant be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Chandler, Wright & Ward, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including March 2, 1936; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California, January 27, 1936.

[Endorsed]: Filed Jan. 27, 1936. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing volume I, consisting of three hundred eighty-two (382) pages, numbered from and including 1 to and including 382, together with Book of Exhibits Accompanying Transcript of Record, consisting of seven (7) pages, numbered from and including 1 to and including 7, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 12th day of February, A. D. 1936.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 6, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7889-C)

Vol. II

TRANSCRIPT OF RECORD

EXHIBITS

Supreme Court of the United States

OCTOBER TERM, 1936

No. 2

JEAN BOURDIEU, PETITIONER,

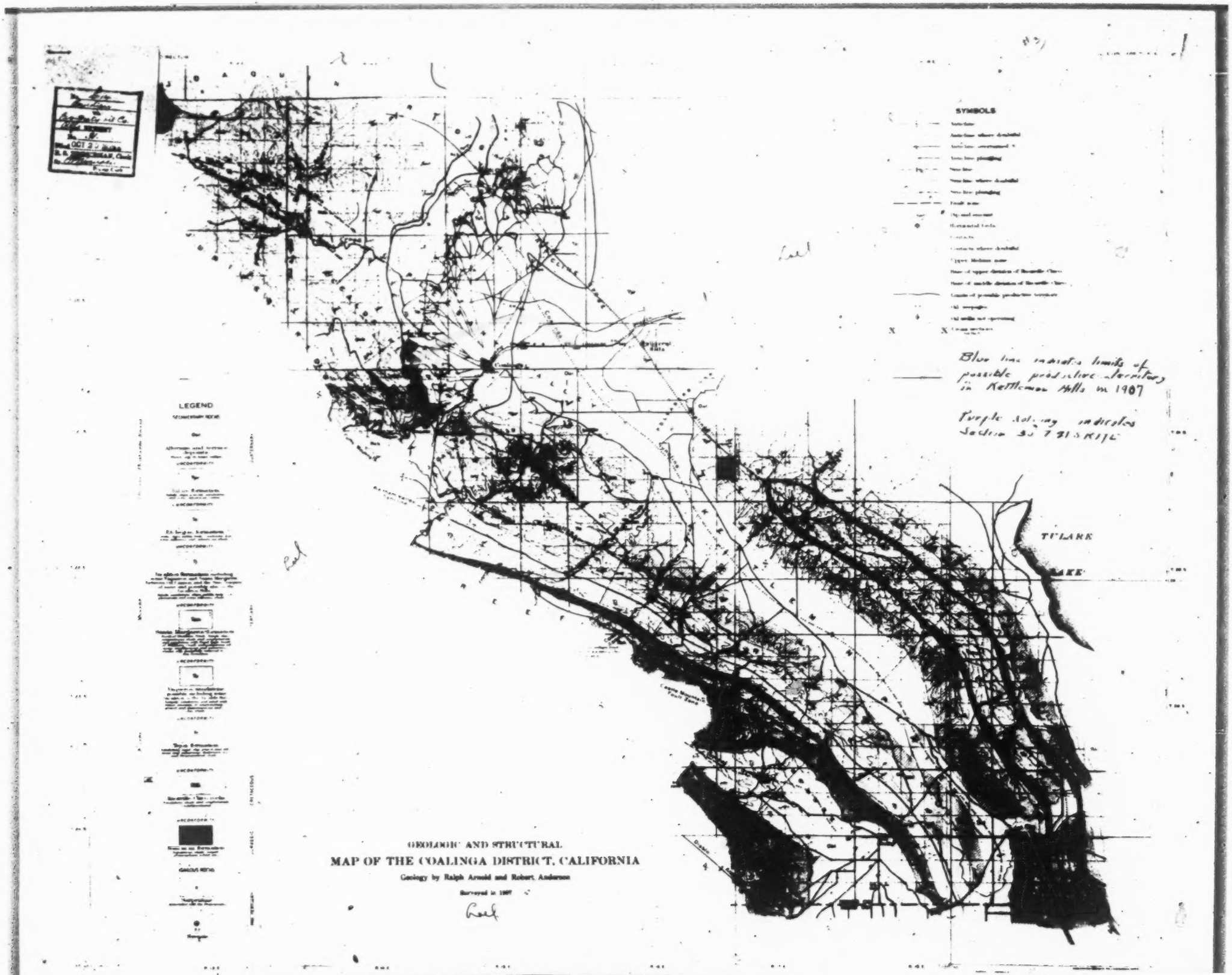
vs.

PACIFIC WESTERN OIL COMPANY, KETTLEMAN OIL CORPORATION, KETTLEMAN NORTH DOME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1936.

CERTIORARI GRANTED APRIL 6, 1936.


SYMBOLS
Blue line indicates limits of possible productive territory in Kettleman Hills in 1907
Purple lettering indicates Section 35 T 21 S R 11 E
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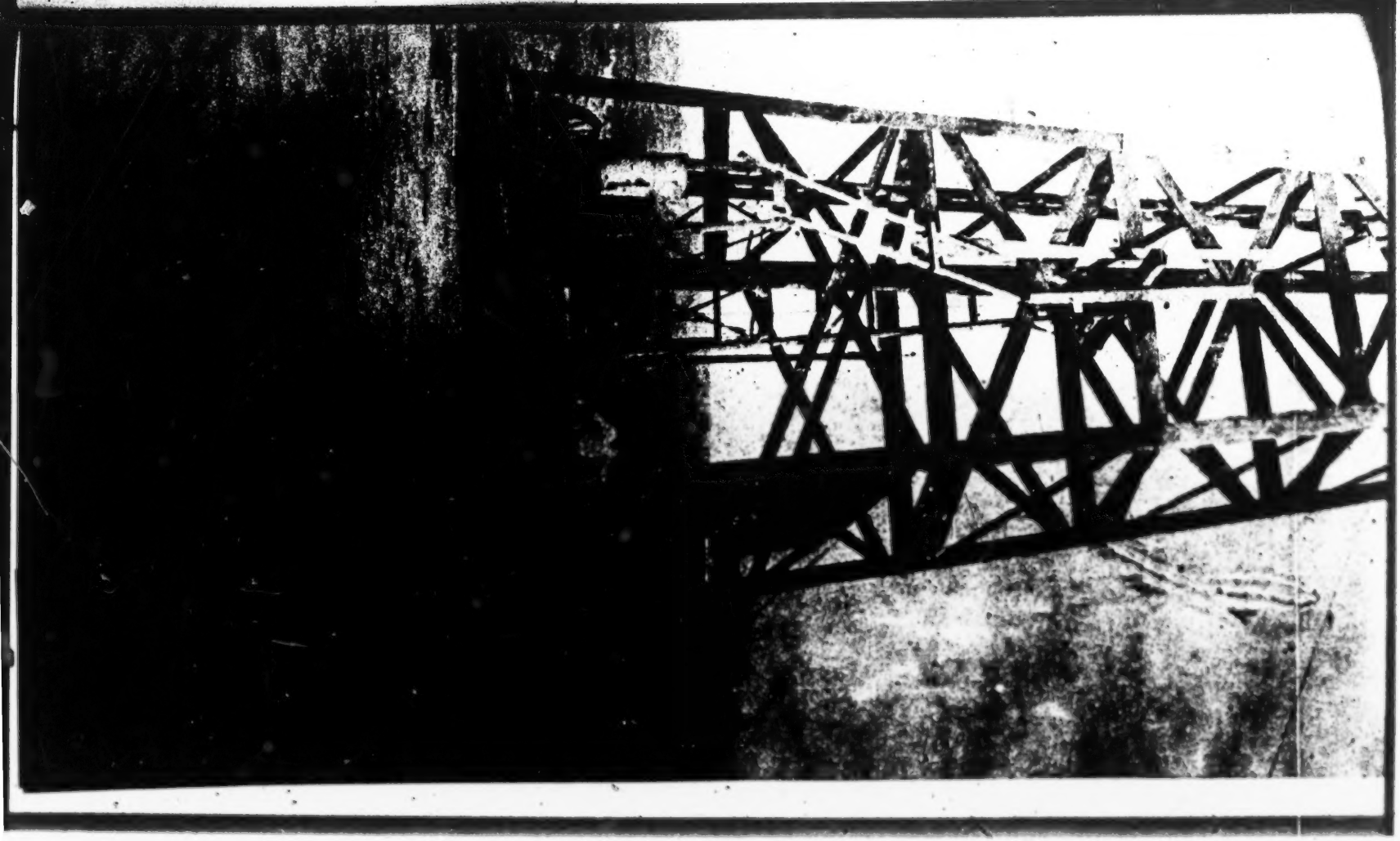
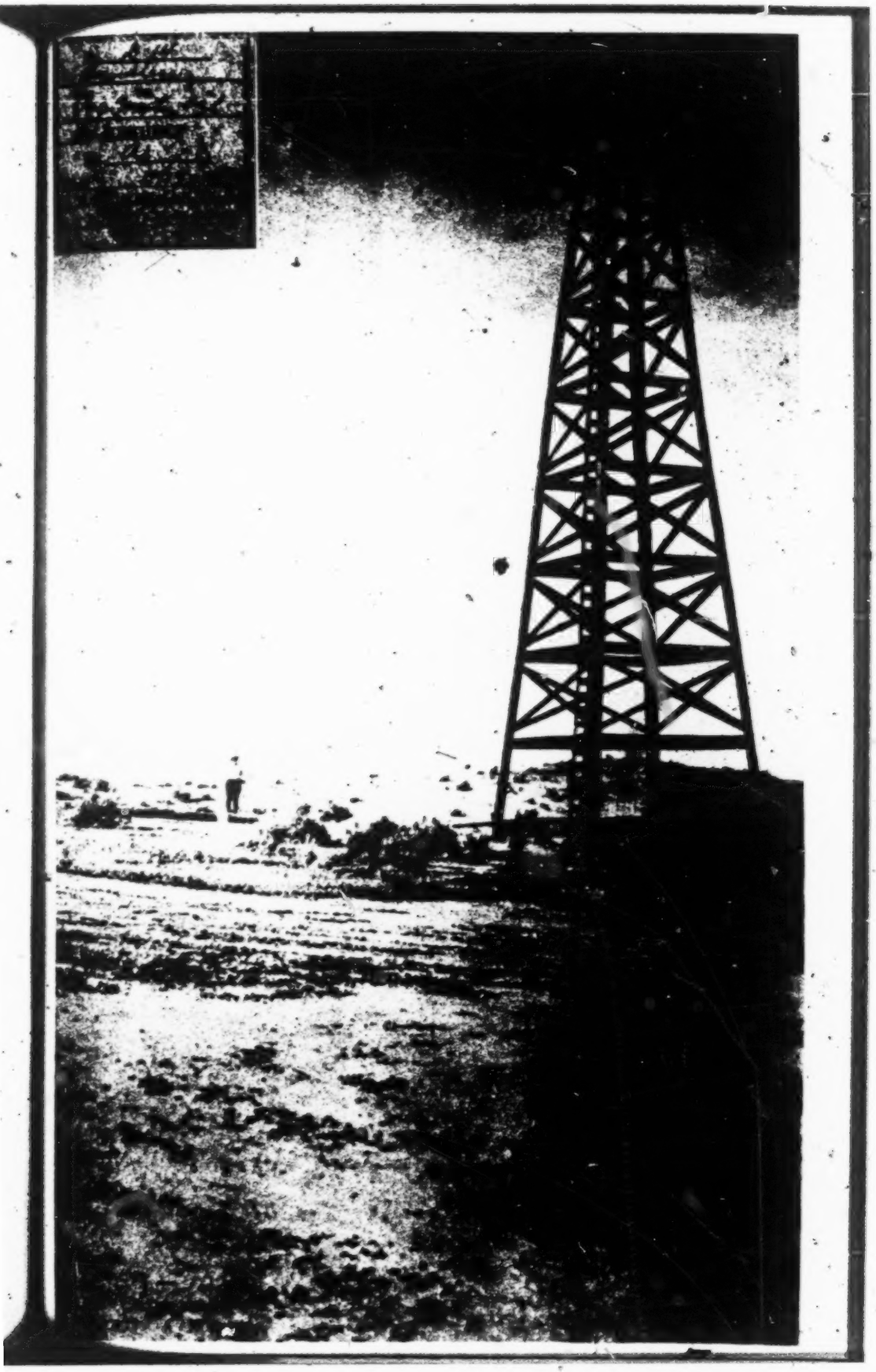
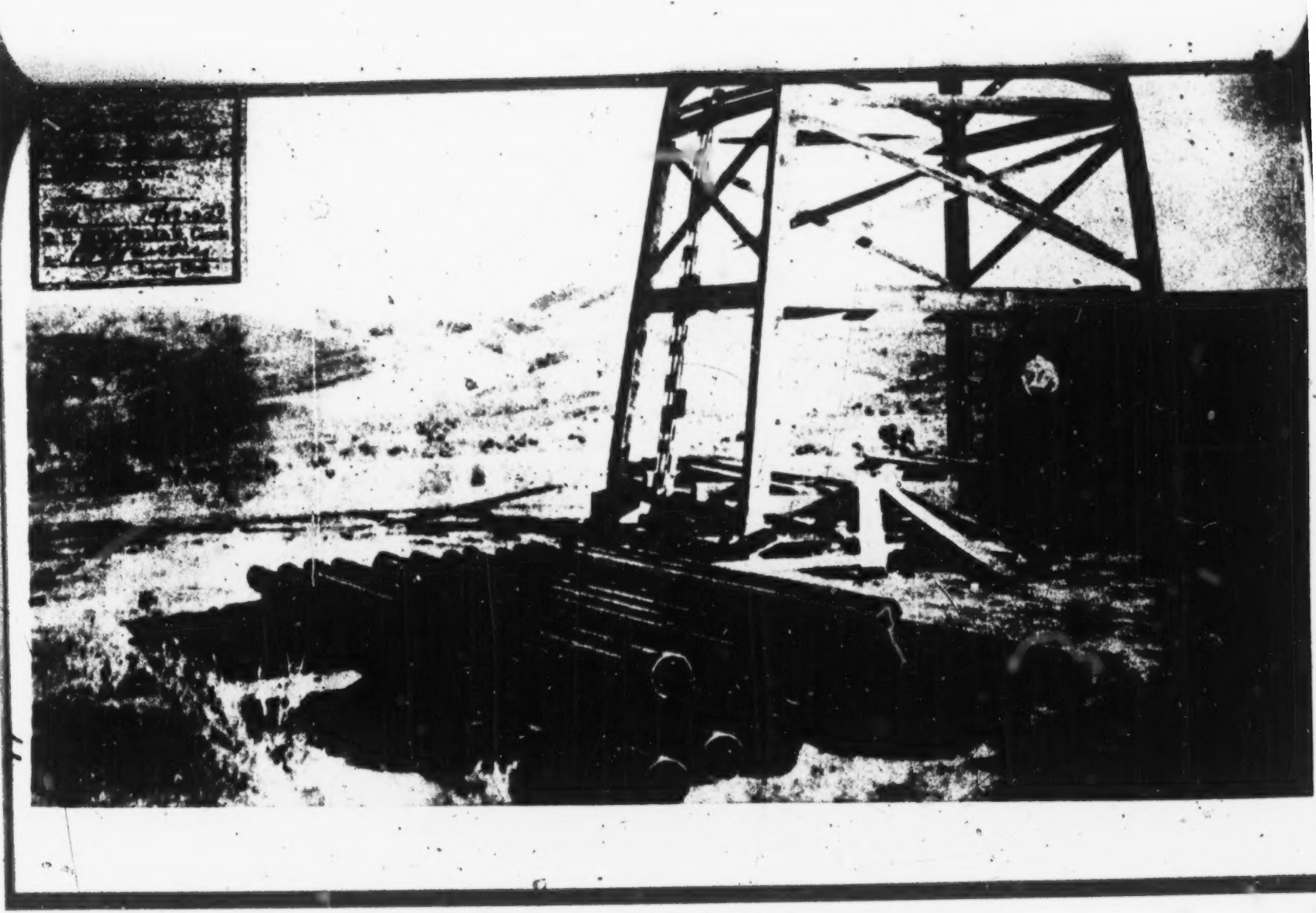
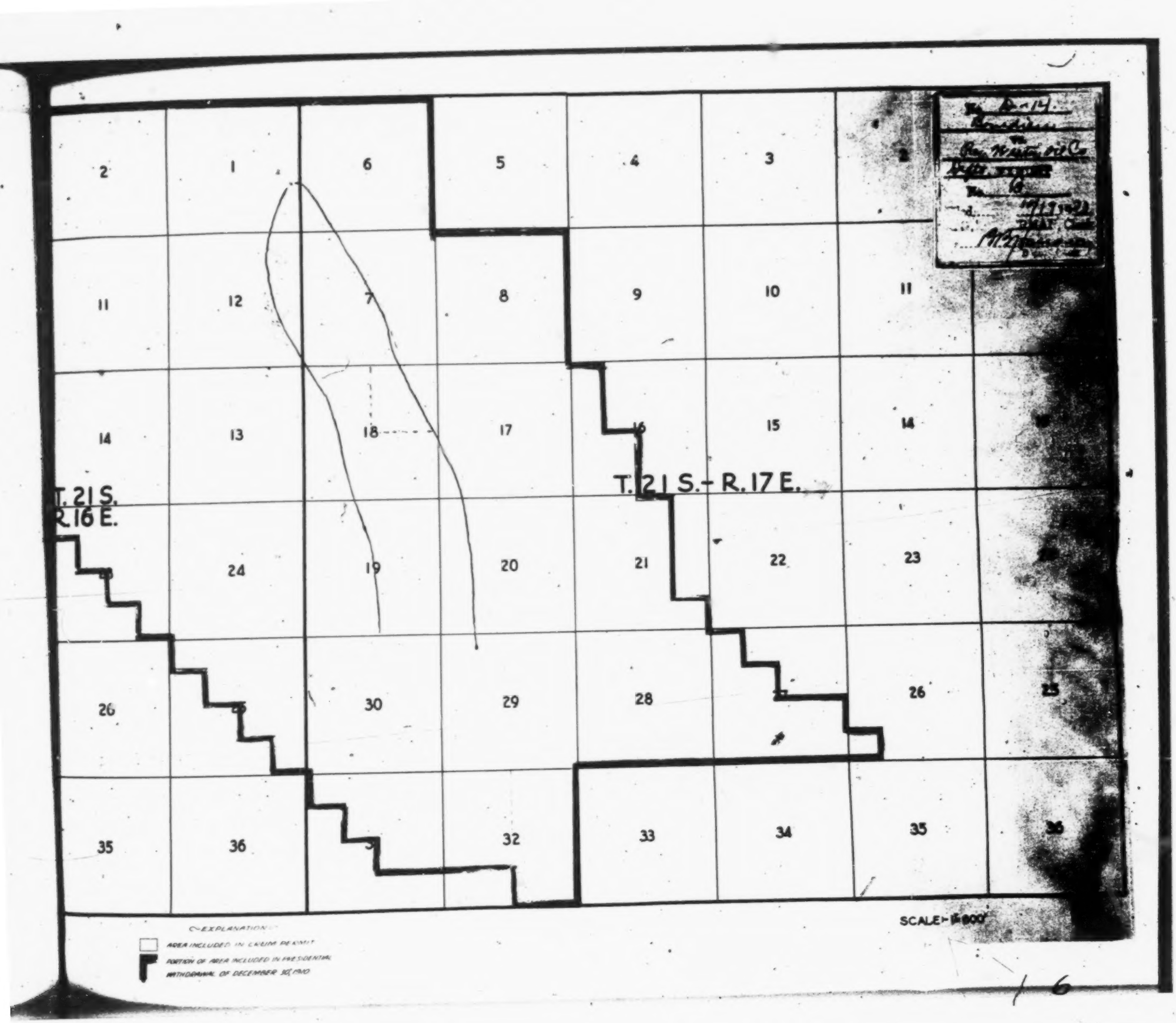
TULARE
LAKE
GEOLOGIC AND STRUCTURAL
MAP OF THE COALINGA DISTRICT, CALIFORNIA
Geology by Ralph Arnold and Robert Anderson
Surveyed in 1907





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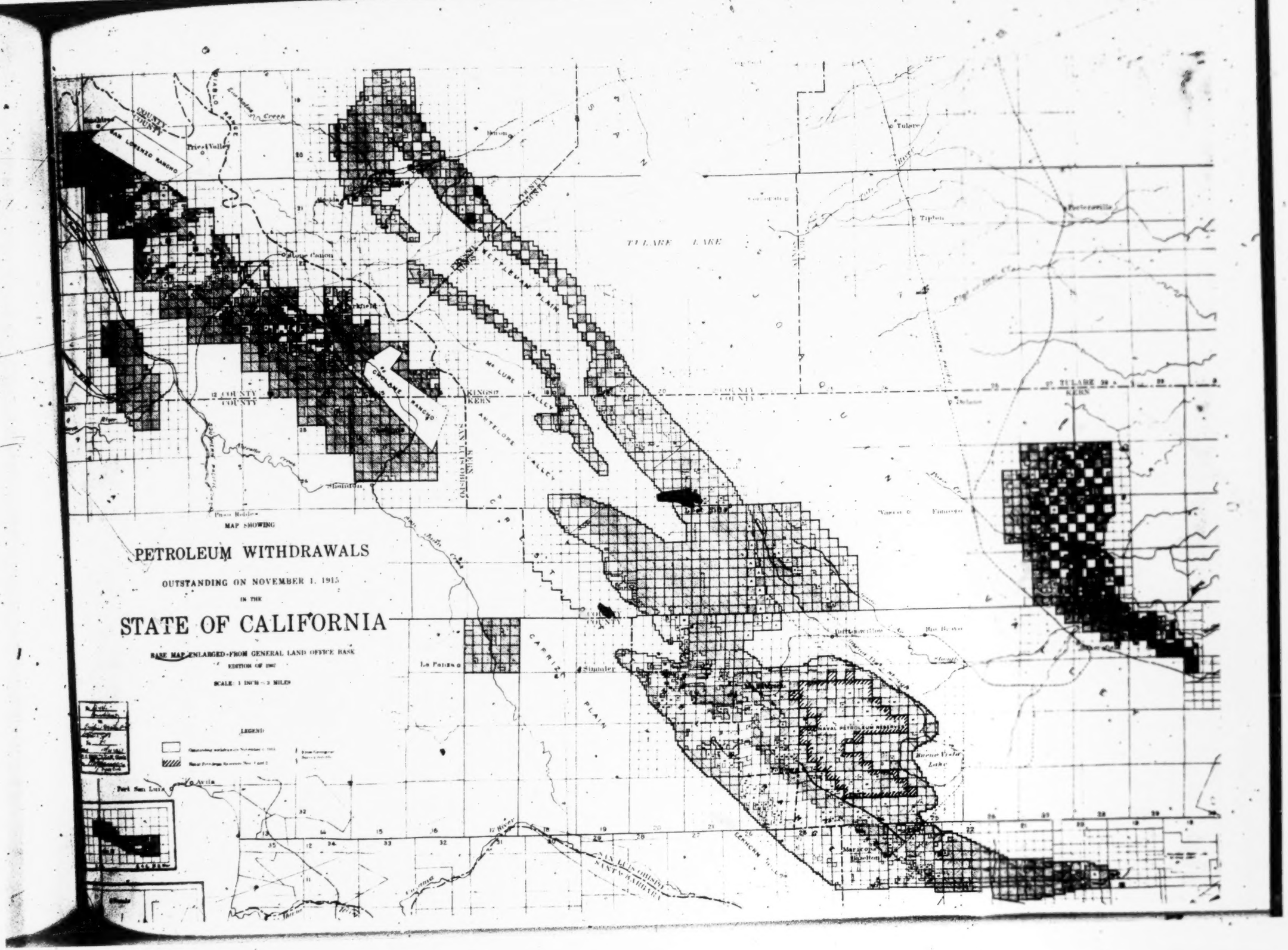
EXPLANATION
AREA INCLUDED IN CRUM PERMIT
PORTION OF AREA INCLUDED IN PRESIDENTIAL WITHDRAWAL OF DECEMBER 30, 1910
SCALE 1" = 800'

16


MAP SHOWING
PETROLEUM WITHDRAWALS
OUTSTANDING ON NOVEMBER 1, 1915
IN THE
STATE OF CALIFORNIA
BASE MAP ENLARGED FROM GENERAL LAND OFFICE BASE
EDITION OF 1907
SCALE: 1 INCH = 3 MILES
LEGEND
TULARE LAKE
SAN JOAQUIN VALLEY
SACRAMENTO VALLEY
MC LURE VALLEY
ANTELOPE VALLEY
CARRIZO PLAIN
SAN LUIS OBISPO
SANTA BARBARA
KINGS
KERN
TULARE
Tulare
Tipton
Porterville
Visalia
Hanford
Lemoore
Corcoran
Wasco
Famoso
Shafter
Bakersfield
Maricopa
Taft
Buena Vista Lake
Simmler
La Panza
Paso Robles
Port San Luis
Avila
Arroyo Grande
Los Alamos
Santa Maria
Lompoc
Guadalupe
Orcutt
Casmalia
Gaviota
Tejon
Caliente
Fellows
Maricopa
Elk Hills
Buena Vista Lake
Midway
Lost Hills
Belridge
Coalinga
Huron
Kettleman
Avenal
Stratford
Armona
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Lemoore
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Kettleman
Avenal
Stratford
Armona
Midway
Lost Hills
Belridge
Elk Hills
Buena Vista Lake

FILE COPY

FILED
FEB 26 1936
CHARLES ELMORE CROP

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. [redacted] 2

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
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Attorneys for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Question Involved:

Is the United States an Indispensable Party to a Suit Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States? 5

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. .....

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Bourdieu, respectfully shows to this Honorable Court that this is a petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a decision made and entered by that court on December 20, 1935, dismissing the suit for want

of jurisdiction, thereby reversing the decision of the United States District Court for the Southern District of California on that point.

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.
HISTORY OF THE CASE.

Petitioner filed suit on July 1st, 1931, in the United States District Court for the Southern District of California to declare and enforce a trust in a certain oil lease issued to respondents in or about December, 1929, by the United States, in so far as the terms of this lease apply to a half section of land situated in Fresno county, California, which had been patented to petitioner under the homestead laws. Motions to dismiss the complaint because the United States was not a party defendant were filed in the United States District Court. These motions were denied on the authority of *Witbeck v. Hardeman,* 51 Fed. (2d) 450 (1931, Fifth Circuit Court of Appeals, affirmed in 286 U. S. 444). Respondents did not appeal from this decision. The District Court subsequently rendered a decision on another issue in favor of respondents. Petitioner made timely appeal from this decision to the Ninth Circuit Court of Appeals. On December 20, 1935, the Circuit Court of Appeals dismissed the appeal on the sole ground of jurisdiction, "it appearing that the United States was not a party defendant to the suit and, therefore, the motions to dismiss made by appellees in the court below should have been sustained" [R. 378]. A petition for a rehearing was denied on January 27, 1936.

II.

QUESTION INVOLVED.

Is the United States an Indispensable Party to a Suit, Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States?

III.

STATEMENT OF FACTS.

Petitioner filed application and made entry of the land involved as a homestead on March 6, 1919, under the Act of February 19, 1909 (35 Statutes 639). Thereafter, on October 25, 1925, patent to said land was issued to petitioner with title to any oil which might thereafter be found retained by the United States under provisions of the Act of July 17, 1914 (30 U. S. C. A. 371), subject to which preference rights have been issued.

At all times since the 6th day of March, 1919, petitioner has been, and still is, the owner and in possession of this land and, since February 25, 1920, he has been entitled to a preference or exclusive right to prospect upon his land for oil and, in case of discovery thereof, to a lease therefor by virtue of Section 20 of the Leasing Act of February 25, 1920 (41 Statutes 437), *infra*.

The Leasing Act provides that the Secretary of the Interior shall promulgate regulations for the exercise of the preference right. The regulations issued in accordance therewith provided that the loss of the preference

right of the homesteader should be governed wholly by the presentation of adverse application, and that *"written notice"* from such adverse applicant must be served upon the homesteader before he could be divested of this preference or exclusive right. Upon receiving this notice he must, within thirty days thereafter, make application or file his intention. This regulation has the force and effect of law.

The law provided, further, that a bond must be furnished the homesteader by any adverse applicant to protect him from any damage which he might suffer by reason of any prospecting being done upon his land. No notice of any kind was furnished to the petitioner, nor was any bond given him as required by law. The permit to prospect was obtained by filing false affidavit as to the facts when the adverse application was made. No prospecting had been made on this land by respondents at the time of filing suit, nor was made until nearly two years thereafter.

B.

REASONS FOR GRANTING THE PETITION.

1. The decision of the United States Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Witbeck v. Hardeman,* 51 Fed. (2d) 450 (affirmed 286 U. S. 444). For the purpose of determining the issue of jurisdiction, and from a *stare decisis* viewpoint, the facts of the instant case are identical with the facts in that case.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of

Appeals for the Tenth Circuit, in the case of *Skeen v. Lynch* (second count), 48 Fed. (2d) 1044 (cert. denied 284 U. S. 633).

3. In the instant case the Ninth Circuit Court of Appeals has decided an important federal question of law in a manner probably in conflict with applicable decisions of this court. The decision is in conflict with the decision of this court in the case of *Waterman v. Canal Louisiana Bank,* 215 U. S. 33. The case of *Witbeck v. Hardeman* was affirmed by this court in 1932, 286 U. S. 444. In that case, if there had been no jurisdiction on account of the absence of the United States as a party defendant, this court, of its own cognizance, would have dismissed the case and would not have affirmed the decision, the point having been raised in, and passed upon by, the Circuit Court of Appeals.

4. The decision of the Ninth Circuit Court of Appeals denies the affirmation of specific jurisdiction conferred upon federal district courts by Section 31 of the Leasing Act.

5. The issue in this case also presents an important question of federal law which has been decided by the Supreme Court by inference in *Witbeck v. Hardeman, supra,* but which should be decided directly to settle the question. Under the provisions of the Leasing Act of February 25, 1920, the ownership of the United States of the mineral rights in millions of acres of land became permanent. This mineral is subject to permits to prospect and to leases. It is a question of great public interest and concern as to whether the United States is an indispensable party in a suit involving this mineral which does not affect the proprietary interest of the United States,

but does affect the interests of its permittee or lessee therein.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled: "Docket No. 7808, Jean Bourdieu, Petitioner, vs. Pacific Western Oil Company *et al.*, Respondents", and that the decree of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, that the cause be remanded to the Circuit Court of Appeals for the Ninth Circuit for further proceedings, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHER B. DORMAN,
Attorneys for Petitioner.

631 Van Nuys Building, 210 West Seventh Street,
Los Angeles, California.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. .....

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith et al.,

Defendants.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and

filed on December 20, 1935, unreported to date [R. 364]. The opinion of the United States District Court on motion to dismiss was not reported.

II.

JURISDICTION.

1. The decree to be reviewed was entered December 20, 1935 [R. 364]. A petition for a rehearing was denied January 27, 1936. The time to apply for a writ of certiorari, therefore, runs from January 27, 1936.

Moore v. United States, 270 U. S. 151, 153.

2. The federal courts have jurisdiction to determine issues arising out of the construction of federal statutes. (Judicial Code, Sec. 24, par. 1.) Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Section U. S. C. A., Title 28, par. 225 (Judicial Code, Sec. 128).

3. This court has jurisdiction to review the judgments of the Circuit Court of Appeals (Judicial Code, 240-a, 43 Stats. 938; 28 U. S. C. A., Sec. 347).

III.

QUESTION INVOLVED.

Is the United States an Indispensable Party to a Suit, Brought to Declare and Enforce a Trust in an Oil Lease, by the Patentee of Land (Oil Reserved to the United States) Vested With a Preference Right to Prospect for Oil and to a Lease in Case of Discovery, Against a Subsequent Fraudulent Permittee and Lessee of the United States?

IV.

STATEMENT OF THE CASE.

A summary statement of the case to determine the issue of jurisdiction has been given under heading "A" in the petition. In the interest of brevity, the statement will not be repeated here.

V.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in reversing the United States District Court denying appellees' motion to dismiss and in holding that there was no jurisdiction, "it appearing that the United States was not a party to the suit, and therefore the motions to dismiss made by the appellees in the court below should have been sustained" [R. 378].

VI.

STATUTE AND REGULATION INVOLVED.

Section 20 of the Leasing Act (30 U. S. C. A. 214) provides:

> "Sec. 20. In the case of lands *bona fide* entered as agricultural, . . . if the entry has been patented with the mineral right reserved, the patentee shall be entitled to a preference right to a permit, and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entrymen and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application."

The regulation promulgated to carry this Act into effect provides [R. 130]:

> "Should an applicant for permit for entered or patented lands with the reservation of the oil and gas content to the United States, be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit he must file application therefor within thirty days of said notice or warning."

VII.

1. PRESENT DECISION CREATES CONFLICT OF LAW IN CIRCUIT COURTS.

The decision of the Circuit Court of Appeals for the Ninth Circuit is contrary to and is in conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Witbeck v. Hardeman,* 51 Fed. (2d) 450, affirmed 286 U. S. 444. It will be seen that the facts of that case are identical with the instant case for the purpose of determining the issue of jurisdiction.

In *Witbeck v. Hardeman* each party desired to prospect for oil on public land, both being qualified under the act to do so. On November 9th Witbeck made oath to his application for permit and mailed it, with the required fee. Hardeman went on the land on November

11th, erected a monument and posted notice thereon, as provided in Section 13 of the Leasing Act, in order to acquire a preference to a permit for thirty days by a stranger to the title over subsequent applicants. Neither claimed a landowner's preference under Section 20. Witbeck, contrary to law, was issued a permit by the Secretary. Hardeman brought a bill in equity against Witbeck *to establish his preference right to prospect* and to be substituted as the permittee. He asked that he be declared the equitable owner of the permit. In this suit, *the United States was not made a party.* On these facts, the United States District Court dismissed the bill for want of jurisdiction "because it concerned property belonging to the United States". The Fifth Circuit Court of Appeals reversed this decision, holding that the United States, though having title and a proprietary interest, was not a necessary party as it would not be injured by any decision rendered. This court affirmed that decision.

In the case of *Alaska Oil Fields v. Raims,* 54 Fed. (2d) 868, the plaintiff therein sought to attach and foreclose the interest of defendant in an oil prospecting permit and lease issued by the United States to defendant. Defendant moved to dismiss the bill because the United States was an interested party and was not named as a defendant. The United States District Court took jurisdiction. In affirming this opinion Judge Wilbur of the Ninth Circuit Court of Appeals, at page 873, states "in view of the fact that we concur in what was said by Judge

Sibley (*Witbeck v. Hardeman*), speaking for the court, we quote therefrom at length as follows":

> "The Secretary of the Interior would not have been a proper party to this suit . . .
>
> But having decided that the lands shall be exploited, he must recognize the statutory preference in issuing the permit, there being no discretion to ignore this plain mandate of the law . . .
>
> It is true that neither lease nor permit ends the interest of the United States in the land involved. If the court were undertaking to dispose of the land to the *injury of the United States,* they would be an indispensable party . . .
>
> But here the law makes the choice and the question is whether the Secretary, by mistaking the law, has given the contract to some one other than the one chosen and intended by the United States speaking through the Congress . . .
>
> But the difficulty is met by the assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this, his consent is implied and may be compelled if refused."

The above language of Judge Wilbur is in direct conflict with the instant case. Therein he states that, although the United States has title or a proprietary interest, this does not necessitate its presence as a party. There must be something more. The suit must be such as to affect the right, title or interest of the United States by depriving it of all or some part of such right, title or interest. The United States must be affected by the result of the suit, and not merely interested in the subject-matter.

2. PRESENT DECISION CREATES A CONFLICT WITH THE TENTH CIRCUIT COURT OF APPEALS.

The decision of the Ninth Circuit Court of Appeals in the instant case on the issue of jurisdiction is not only in direct conflict with the Fifth Circuit Court of Appeals, but it is also in conflict with the Tenth Circuit Court of Appeals, as shown by *Skeen v. Lynch,* 48 Fed. (2d) 1044; cert. denied, 284 U. S. 633. The facts show that Skeen had title to 640 acres of land under the Stock Raising Act of December, 1916, with a reservation of "coal and other minerals" to the United States. The United States issued an oil prospecting permit and lease to defendants. Whereupon Skeen brought suit against this permittee and lessee of the United States without naming the United States a party defendant. This suit was brought on two counts. On the first count *Skeen claimed ownership of the oil on the principle of ejusdem generis as against the title* of the United States. On the second count he *sought a preference right to a permit to prospect* for oil and to a lease under Section 20 of the Leasing Act, as against the subsequent permittee, Lynch. He sought to hold defendant, permittee and lessee of the United States, as his trustee *ex maleficio.* On the first count, the United States would have been injured by the loss of title to the oil if plaintiff had prevailed. On the second count, involving a preference right to prospect under a permit from the United States, it would not have been injured. The suit on the second count is similar to *Witbeck v. Harde-*

man and the instant case, both as to the facts and remedy. The decision of the court in both cases granted jurisdiction on the cause of action asserting a preference right.

In a memorandum opinion the United States District Court held that, on the first count, the United States was not an indispensable party, and on the second that it was. We quote from this opinion:

First count:

> "The court is of the opinion, that for the purpose of construing the language, 'coal and other mineral', as used in the Act of December 29th, 1916, the United States of America is not a necessary or indispensable party. . . ."

Second count:

> "The court does not determine whether or not plaintiff had a preference right to obtain from the United States a permit to prospect for gas and oil for the reason that it is without jurisdiction in the absence of the United States or the Secretary of the Interior as a party to the suit."

On each count the decision of the District Court was wrong, as the jurisdictional question was urged on both counts. *The Tenth Circuit Court of Appeals reversed the opinion above on both counts and, in doing so, observed the correct rule* for which petitioner contends, namely: that the United States is an indispensable party if inter-

ested in the result of the suit, or if it would be adversely affected thereby, and not otherwise. This opinion of the Tenth Circuit Court of Appeals, in which certiorari was denied, held that the United States was not necessary for the purpose of jurisdiction on the second count, and decided this issue involving a preference right on the merits. On the first count, in which plaintiff *sought title to the mineral,* as against the title of the United States, the Circuit Court of Appeals stated:

> "As to the first cause of action, the court is of the opinion that the United States is an indispensable party . . .
>
> The interest of the United States in the subject-matter of litigation is not less obvious and substantial than it was in the case of *Louisiana v. Garfield,* 211 U. S. 70. . . .
>
> A decree for plaintiff on the first count would be a cloud on the title of the United States."

In the *Louisiana* case referred to the same principle was involved as in the *Skeen* case on the first count, since the state of Louisiana *sought title* as against the *title* of the United States. Hence, it is evident that the case of *Skeen v. Lynch* illustrates the distinction contended for by petitioner and observes the rule announced by this court to the effect that, if the absent party would be injured, it is an indispensable party; otherwise it is not.

3. PRESENT DECISION IS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

As Mr. Justice Day states in *Waterman v. Canal Louisiana Bank*, 215 U. S. 33, 49:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case that will do justice between the parties actually before the court, without *injuriously affecting* the rights of such absent party. If the court can do justice to the parties before it *without injuring* absent persons, it will do so. We are, therefore, of the opinion that the court erred in holding that there was no jurisdiction, and the decree is reversed."

The present decision is in conflict with the above opinion of this court. Petitioner does not seek title against the United States. He seeks merely a preference right to prospect conferred upon him by law, just as Hardeman and Skeen (second count) did, and in both those cases it was held that the United States would not be injured.

The case of *Witbeck v. Hardeman* was affirmed by this court in 1932, 286 U. S. 444. In that case, if there had been no jurisdiction on account of the absence of the United States as a party defendant, this court, of its own motion, would have dismissed the case and would not have affirmed the decision, the point having been raised in and passed upon by the Circuit Court of Appeals.

This is not a suit against the United States, nor is any relief asked from the United States. Through fraud, the permit to prospect as to this land was granted to the wrong person. Petitioner seeks to be substituted for

the respondents, who wrongfully deprived him of his legal right. The prayer of the complaint states [R. 12]:

> "Wherefore, this plaintiff prays that this court render its judgment and decree as follows:
>
> That defendant Pacific Western Oil Company holds title to the hereinabove described lease in trust for this plaintiff insofar as said lease affects the property described in this complaint."

From the above it is clear that what petitioner asks is simply a substitution in which the Secretary could exercise no discretion under the terms of the law, Congress having made the choice of permittee when the law was enacted.

The objection that a decision in favor of petitioner would be an interference with the functions of the Land Department is not sound. Petitioner was not required to make application for a permit at any time before being served with *written notice*. The Department holds, in the case of *Matt Mechaley*, 51 L. D. 413, at p. 415:

> "Section 20 of the Leasing Act did not place any limitation upon the time allowed any entryman to assert a preference, and that limitation is governed wholly by the presentation of adverse application."

Again, in *Shaw v. Rink*, 50 L. D. 411, the necessity of such *written notice* by an adverse applicant, in order to divest the owner's preference right, is further emphasized.

From the above it is seen that there was no necessity of application to the Land Department in the absence of

written notice, and that there was no discretion which the Department could exercise. Such right has no relationship or dependence upon the claim of others, strangers to the title. It is sufficient that petitioner has been deprived of exercising his right by the fraudulent acts of respondents. Petitioner's preference right was by reason of the ownership and possession of the land. There could be no conflict between applicants by the terms of the law, which eliminates a possibility of the exercise of discretion in the matter.

The decisions in the *Witbeck v. Hardeman, Alaska Oil Fields v. Rains,* and *Skeen v. Lynch* (second count) *cases are controlling in the instant case on the issue of jurisdiction.* In those cases the court decided that the United States was not interested in the results of the suit, would not be injured by any decision rendered and, hence, was not an indispensable party.

If the decisions above are not the law for the instant case, then petitioner, whose interests have been prejudiced by fraud, and who is asking nothing of the United States, nor for anything which can affect the United States, has no redress in a court of equity. As he received no written notice or bond, as provided by law for his protection, he had no knowledge of respondents' application before the Land Department. It is elementary that, while such matters are pending before the Department, courts may not interfere or assume jurisdiction. Petitioner learned of respondents' lease by reading it in a local newspaper. If subsequent to the contract or lease, it is held that the United States must be a party, and that the United States may not be sued, this failure of remedy becomes obvious. Such is not the law. There is a remedy for every wrong.

4. PRESENT DECISION CONFLICTS WITH SPECIFIC AFFIRMATION OF JURISDICTION CONTAINED IN SECTION 31 OF LEASING ACT.

Even if it could be argued that, prior to 1920, there was no jurisdiction, the force of Section 31 destroys such argument. Petitioner has no remedy by mandamus. The jurisdiction of the federal courts is affirmed by Section 31 of the Leasing Act, which is declaratory of the law. It provides that the authority of the Secretary shall cease when a lease is executed, and that the federal District Courts shall have jurisdiction thereafter:

> "Sec. 31. That any lease issued under the provisions of this act may be forfeited and cancelled by an appropriate proceeding in the United States District Court for the district in which the property or some part thereof is located, whenever the lessee *fails to comply* with *any of the provisions of this act, of the lease,* or of the *general regulations promulgated under this act* and *in force at the date of the lease;* and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof."

It is to be noted that, if the lessee fails to comply with any of the provisions of the Leasing Act or the regulations promulgated thereunder, the lease is subject to forfeiture and cancellation in the federal courts. It obviously follows that the court would have jurisdiction to declare the lessee to be holding as a trustee, and to substitute the

petitioner in place of the lessee. Both the permit and lease issued provided that "all valid rights existing at the date of this permit (or lease) will not be affected thereby" [R. 219]. If the authority of the Secretary ceased when the lease was executed, it is self-evident that he could not be compelled to cancel a lease, the jurisdiction being entirely in the courts.

5. THE PRESENT DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The issue of jurisdiction in this case presents an important question of federal law which has been decided by the Supreme Court by inference in *Witbeck v. Hardeman*, but which should be decided directly to settle the question. Under the provision of the Leasing Act of February 25, 1920, the ownership by United States of the mineral rights in millions of acres of land became permanent. This mineral, under the declared policy of Congress, is subject to permits to prospect and to leases. It is a question of great public interest and concern, therefore, as to whether the United States is an indispensable party in a suit which does not affect the proprietary interest of the United States, but does affect the interest of its permittee or lessee therein.

CASES CITED BY CIRCUIT COURT OF APPEALS TO SUSTAIN INSTANT DECISION DIFFER AS TO THE FACTS AND REMEDY SOUGHT.

For the purpose of determining this issue of jurisdiction, it is presumed that petitioner had a preference right to prospect upon the land patented to him as his homestead, that this property right vested in him as the owner of the land, and could be divested by an adverse applicant only by compliance with the above provisions of law as to notice and bond.

> "In determining the question of jurisdiction, the facts set up by the bill must be considered true."
>
> *Milwaukee v. Milwaukee,* 2 Wall. 609 (69 U. S. 895).

The authorities relied upon by the Circuit Court of Appeals in its decision are readily distinguishable on the facts and remedies demanded and are not in point to determine the issue of jurisdiction. The distinction is that, in the case at bar, petitioner does not seek title or to have the court dispose of the land to the *injury of the United States.* He seeks merely to be given the contract to prospect as to his homestead, which the United States, speaking through the Congress, provided that he should have. In the *Wilson; Proctor* and *Skeen* (first count) cases, cited by the Circuit Court of Appeals [R. 379], the plaintiffs sought *to deprive the United States of title.* In other words, in these cases plaintiffs sought a title in fee and, under the circumstances, the United States was

an indispensable party, as it would have been injured by losing title to such mineral. These cases were against the United States, and the relief sought could have been granted only by the United States. For the convenience of the court we call attention to the facts of these cases, which make them inapplicable:

In the case of *Wilson v. Elk Coal Co.*, 300 Fed. 473, C. C. A., 7 Fed. (2d) 112, the facts disclose that plaintiff did not have any title to the land, but had simply a preference right of entry under the Purchase Act. The United States had title in fee. The Land Department rejected Wilson's right to purchase and the land reverted to the public domain. Several years thereafter the United States leased the coal rights to the defendants. Whereupon Wilson brought suit against defendants to declare a trust and to cancel the lease without making the United States a party. He alleged that "equitable title vested in him as against the United States". The District Court decreed that there was no jurisdiction in the absence of the United States, using the following language:

> "Until the *issuance of patent,* inquiry as to the equitable rights of parties is within the cognizance of the Department. . . . His remedy is against the Secretary of the Interior to *compel the issuance of patent.* If patent to the land had issued to the defendant, and plaintiff had a vested right by reason of acts done pursuant to law, he might maintain an action to decree such title in trust for the plaintiff. The patent not having been issued, the relief herein sought cannot be granted."

The Circuit Court of Appeals, in affirming the decree of the District Court, took the same position and assumed, on the issue of jurisdiction, that Wilson had an equitable right to *purchase the fee title under the Purchase Act* from the United States, and that his action was predicated upon this fact.

Naturally, the United States was an indispensable party in the *Wilson* case, since he was claiming title as against the United States, and it would have been injured by an adverse decision. The United States had a direct interest in the suit, as it would have lost title if plaintiff had prevailed.

In the instant case the petitioner holds a patent and the issue is the enforcement of equities vested in him by virtue of being the patentee. The United States is not interested in the suit, nor can it be adversely affected as the result of any decree rendered. For this reason, we think the *Wilson* case relied upon by the Circuit Court of Appeals is clearly distinguishable on its facts and the remedy invoked. Its reasoning supports the contention of petitioner.

In the case of *Proctor v. Painter*, 300 Fed., 476, C. C. A., 15 Fed. (2d) 974, the facts disclose that this suit pertained to two parcels of coal land. One was owned outright by the United States, with a lease of coal rights to a coal company. The other was owned under a restricted title by Painter, with coal reserved to the United States. As to this latter, Proctor contended that Painter

was entitled to a patent in fee and that Painter should be made trustee for this fee title as against the United States. The purpose of the suit was to declare Painter trustee of the fee title to all the land, plaintiff contending that fee title passed to him.

The above case, cited by the Circuit Court of Appeals, follows the reasoning in the *Wilson* case and follows the rule announced above, since, if the plaintiff had prevailed, *the United States would have been deprived of title.* Any claim which the plaintiff Proctor had was predicated upon the Purchase Act. He sought a fee title to the land; hence, the District Court states that, since he sought title to the land, and since title was in the United States, the United States was an indispensable party. The Circuit Court of Appeals bases its decision upon these grounds, as will be seen from the quotation given on page 974 of that opinion.

> "As to the south half of the quarter section the appellant contends that title passed absolutely to Painter under his patent, because the patent contained no reservation of the underlying coal, and that the right of the appellant to proceed against Painter was not affected by the subsequent quitclaim to the United States. . . ."

CONCLUSION.

In principle and on the facts the instant case is similar to the following authorities holding that the United States is not an indispensable party, as it is not interested in the result of the suit, nor would it be injured by any decision rendered:

Witbeck v. Hardeman, supra;
Alaska Oil Fields v. Rains, supra;
Skeen v. Lynch, supra (second count).

It is clearly distinguishable from the three authorities cited by the Circuit Court as the rule applicable here, holding that the United States was an indispensable party, namely:

Wilson v. Elk Coal Co., supra;
Proctor v. Painter, supra;
Skeen v. Lynch, supra (first count).

In these latter cases the facts show that the relief sought was against the United States. Any decision in these cases favorable to plaintiff would have injured the United States, as it would have deprived the United States of title to the mineral.

It is respectfully submitted that the opinion of the Circuit Court of Appeals for the Ninth Circuit is in direct conflict with the opinion of the Fifth Circuit Court of Appeals, which opinion has been affirmed by this court, and in which the facts and remedy are identical with the instant case on the issue of jurisdiction.

It is submitted that it is in direct conflict with the opinion of the Tenth Circuit Court of Appeals in *Skeen*

v. Lynch (second count). These opinions support the well-established rule that the United States is not an indispensable party if it has no interest in the result of the litigation, and would not be injured thereby. These opinions are not repugnant to the decisions cited by the Circuit Court of Appeals, as in each of these cases the plaintiff *sought title as against the United States.* The United States is not interested in the instant case, nor can it be affected by the substitution of the petitioner as permittee and lessee. The terms of law fix the right of petitioner to prospect on his homestead, and the Secretary has no discretion in the matter as the law is mandatory.

Wherefore, in view of the foregoing, it is urged that this petition be granted, in order that this Honorable Court may pass upon this important question, reverse the decision of the United States Circuit Court of Appeals, and remand the same to that court for further proceedings, and thus relieve petitioner of the grievous injustice that has been done him on account thereof.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 2.

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith, et al.,

Defendants.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S SUPPLEMENTARY BRIEF.

STATEMENT OF FACTS.

In this Supplementary Brief, petitioner, in the interest of brevity, will not repeat the statement of facts set forth

in his brief in support of the Petition for Writ of Certiorari. All the facts necessary to determine the issue of jurisdiction are contained therein.

We call attention, however, to the statement found on page 4 of respondent's brief in opposition to the writ which we quote:

> "It (the Bill) does not allege that the petitioner ever made application to the Land Department for a prospecting permit or lease, and the proof adduced at the trial shows that no such application was ever made by petitioner. The Bill does not allege that any of the respondents fraudulently prevented or attempted to prevent petitioner from obtaining from the United States either a prospecting permit or an oil and gas lease covering the land involved."

From the respondents' theory of law as to the nature of a preference right granted to the landowner in Section 20 (App.), the above facts would be pertinent to the issue of jurisdiction, since they would affect the discretion of the Secretary of the Interior in recognizing a preference right. Petitioner's theory is that it was not necessary for him to make application for a prospecting permit, since by the statute he was granted a vested property right. This property right could be divested only by an adverse applicant after personal service of notice and posting of bond in compliance with the provisions of the applicable regulations which have the force and effect of law. As these regulations provide the machinery for forfeiture, they require strict interpretation.

Unless this notice be given, there arises the unsupportable situation of a grantee of a preference right by Congress being deprived of his vested property right without due process of law.

It is wholly immaterial to the issue of jurisdiction whether there was actual fraud, constructive fraud, or mistake of law. The complaint does allege "that on or about the 28th day of May, 1921, defendant Thomas M. Crum illegally and wrongfully, and with knowledge of complainant's right", procured a permit in violation of complainant's right, for the reason that no personal notice was given to complainant by defendants, or no notice of any kind. [R. 9.]

Section 1573 of the California Civil Code provides that constructive fraud consists:

> "(1) In any breach of duty which, without actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him."

One of the issues in the trial of the case was the element of fraud, and one of the assignments of error is based upon fraud. In his application for a permit, one of the defendants made false affidavit to the Land Department that petitioner was not claiming a preference right, and that he had made a thorough investigation to ascertain that fact. [R. 213.] On the witness stand, this same defendant testified, however, that he had not given

petitioner any notice at any time regarding his application. Notice is knowledge. This situation clearly implies fraud, and the inference is that notice was not given in order to prevent the matter coming before the Land Department for decision. It is significant that in the decree naming the defendants upon whose part there was no fraud, the name of Thomas M. Crum is omitted. The proof disclosed, further, that petitioner claimed a preference right and relied upon compliance with such notice made for his protection. [R. 107.]

Irrespective, however, as to whether there was actual fraud, or merely constructive fraud resulting from a breach of legal duty, that fact is wholly immaterial to the issue of jurisdiction, as it has no bearing upon the question as to whether the United States is an interested party in the litigation such as to require its presence.

FACTS AFFECTING LAND IN ISSUE.

The Government surveys reported this land to be agricultural. No contest or protest was ever filed in the Land Office questioning its agricultural character. [R. 132.] In June, 1908, it was classified as agricultural by the Geological Survey which was the only classification as shown by the official record in the Land Office ever made prior to entry. [R. 158-175.] At the same date in 1908 other land in the same general region was classified as mineral and was then "withdrawn as mineral land" by operation of the mineral land laws (not an executive

order). [R. 267.] In December 1910 this land was again suspended "for classification", but according to the certified statement of the Geological Survey, was not thereafter classified as mineral. [R. 158.]

On March 6, 1919, petitioner filed application under the Act of February 19, 1909, which provides that the Secretary must determine that the land is "actually" non-mineral in character before issuing a patent. [App.] At this time petitioner filed affidavit and other evidence of non-mineral character in accordance with the provisions of Section 2 of the Act of July, 1914. [App.] Thereafter additional affidavits were filed and certificate of entry issued. In 1925 patent was issued with any prospective oil retained by the United States under a regulation which provided, "that notwithstanding such showing of (non-mineral character) if the Department shall conclude that the land has a prospective value, such action will be taken as the facts may warrant." [R. 191.] The sole question presented on the merits is one of law:

> Whether a homesteader's preference right to prospect under Sec. 20 on land determined to be non-mineral in character at the time of entry, is defeated by an executive order "for classification" issued prior to entry.

JURISDICTION.

I.

Law and Argument.

Question: Is the United States an indispensable party to a suit brought to declare a trust in an oil lease by the patentee of the land (Oil reserved to the U. S.) *vested* with a preference right to prospect for oil and to a lease in case of discovery, against a subsequent fraudulent permittee and lessee of the United States?

Three cases decided by different Circuit Courts of Appeal are controlling in the instant case on the issue of jurisdiction, these decisions being *Witbeck v. Hardeman,* 51 Fed. (2d) 450, affirmed in 286 U. S. 444; *Alaska Oil Fields v. Rains,* 54 Fed. (2d) 868; and *Skeen v. Lynch,* 46 Fed. (2d) 1044. An analysis of the facts of these cases is set forth on page 12 of petitioner's brief in support of the writ. The facts involved are similar to the case at bar to determine jurisdiction. In applying the law, the Circuit Courts held that the United States was not interested in the results of the suit, would not be injured by any decision rendered, and hence was not an indispensable party.

In reviewing the facts of the above cases it will be seen that in each of them, the United States was the owner and lessor of oil land, as in the case at bar. The United States had issued a permit or lease to the defendants. The plaintiffs were claiming the right to the lease and brought a Bill in Equity, without naming the lessor as a party defendant. The question presented in each case was, whether the United States, as lessor, had such an interest in the litigation as required its pres-

ence as a party defendant. The Circuit Courts held that the mere proprietary interest of the United States, as lessor, is not sufficient to require its presence as a party defendant. In each case it was urged that the United States had the right to select its lessee, that the substitution of another lessee by operation of law was an interference with the discretion of the Secretary, and that in being deprived of the exercise of this discretion, the United States would be injured. This is the gist of the argument urged by the respondents in the instant case. The reasoning given by Judge Sibley in *Witbeck v. Hardeman, supra,* beginning on page 450, fully answers this argument. In *Alaska Oil Fields v. Rains, supra,* the Ninth Circuit Court of Appeals adopted the same reasoning.

Judge Sibley points out that the issuance of the lease is the last act required of the Land Department, and in that respect it is akin to the issuance of a patent. Since the courts have always taken jurisdiction after a patent had been issued to ascertain whether granted to the wrong party through fraud, or mistake of law, and to afford relief in proper cases, the same reasoning applies in the case of a lease. He states, further, that the Secretary has no discretion in selecting the lessee, as Congress made the choice, and that the provisions of the law are mandatory. As the Secretary must recognize this preference right, perforce there is no interference with the functions of the Land Department, or no discretion violated by the substitution of the rightful party as lessee. This reasoning of the Court applies fully to the facts of the instant case. The trial court accepted the decision of *Witbeck v. Hardeman* as controlling, it having been, by inference, affirmed by this court. We believe that this reasoning is sound in principle and should be sustained.

II.

Cases Cited by Respondents Are Not in Point.

Respondents in their brief, in opposition to the writ, at pages 13 and 17, cite the case of *Oregon v. Hitchcock,* 202 U. S. 70, and *South Penn Oil Co. v. Miller,* 175 Fed. 729, as supporting the proposition that a lessor is a necessary party when the lease is involved, and that the United States is an indispensable party where it holds title, contrary to the decrees in the cases discussed above. In our opinion, an analysis of these decisions will show that they are in accord with the correct rule. These cases state the principle that jurisdiction must be determined by the effect of the judgment or decree which is to be entered. In the Oregon case, the suit was against the United States, as plaintiff sought to divest the United States of title. Herein Mr. Justice Brewer states:

> "The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock,* 185 U. S. 373, wherein we said:
>
> 'Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale,—to *divest the government of its title, and vest it in the state.* The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by *the result of the judgment or decree which may be entered,* the same rule must apply to the United States. The question whether the United States is a

party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.'" (Italics ours.)

In the *South Penn Oil* case mentioned above, the court held that it could not adjudicate rights under conflicting oil leases of the same property executed by different lessors, in a suit between the lessees to which the lessors were not parties, as the title was necessarily involved. In this connection, the court states, at page 736:

"We also think the record discloses the fact that parties absolutely essential to the proper disposition of the questions decided by the court below were not before it, and that consequently, even had the subject-matter of the controversy been properly within its jurisdiction, the court could not have effectively disposed of it. Neither the lessors of the complainants, nor of the defendant, were made parties to the suit, and yet the final decree disposed of the funds in which they were interested, and decided *the title to the property which they claim to own in fee simple. It takes from the one and gives to the other set of claimants portions of the land claimed, respectively, by those not made parties. It adjudges that the complainants are the owners, by virtue of their leases for oil and gas,* of the real property in dispute that is located to the west of a certain line, although such property is claimed *in fee simple* by the lessors of the South Penn Oil Company, who were *not permitted to defend their titles* . . . Evidently the decree of the court below *could not finally and effectually dispose of the controversy, as the lessors referred to were indispensable parties, and those claiming under it would hold defective titles.*" (Italics ours.)

In principle, the cases above quoted are similar to the case of *Wilson v. Elk Coal Company*, cited by the lower court and discussed on page 23 of petitioner's brief in support of the writ. The plaintiff therein, in effect, sought title from the United States, and the relief could have been granted by the United States alone. A clear line of distinction exists between these cases, and the cases of *Witbeck v. Hardeman, Alaska Oil Fields v. Rains* (*supra*), and the instant case, wherein the plaintiff does not seek title, or anything which would injure the title of the United States. He is asking to be substituted for the lessees' interest only. The finality of any judgment rendered is not affected by the absence of the United States. This court has held repeatedly that the fact that the United States has title to the subject matter, does not make it an indispensable pary. The reasoning in the Louisiana case below is very pertinent to the instant case.

Work v. Louisiana, 269 U. S. 250;
Garfield v. Goldsby, 211 U. S. 249 at 261.

In the case at bar, there is no attempt to transfer the title of the United States. The contest is entirely between the parties litigant, and it in no way infringes the right, title or interest of the United States.

Correa v. Barbour (1934), 71 Fed. (2) 9;
Pollack v. Mansfield, 44 Cal. 36;
Meydenbauer v. Stevens, 78 Fed. 787;
Osburn v. Bank of U. S., 9 Wheat. 738.

In delivering the opinion of the court, in this last case cited, Chief Justice Marshall used the following language:

> "It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff and the possession is in the defendant, the jury cannot be stopped by the mere assertion of title in a sovereign."

The cases cited are conclusive in establishing that the United States is not a necessary party where an officer or agent of the United States is in possession of the land in controversy, or by analogy, when he is a lessee.

III.

Nature of Preference Right Granted to Landowners in Section 20.

Two fundamentally different theories of law are presented herein as to the nature of the preference right granted in section 20 of the Leasing Act. As this question bears directly upon the issue as to the interest of the United States in the controversy, and the discretionary duties of the Secretary, we deem it important that this court determine that question.

Petitioner urges that the entryman's or patentee's preference right contained in section 20 of the statute is a vested property right of which he could be divested by an adverse applicant only by compliance with the provisions of law as to service of personal notice upon him. Respondents in distinction insist that it was a mere privilege or offer requiring acceptance, which the landowner acquired for the first time when he made appli-

cation therefor, and which could be extended or withheld at the discretion of the Secretary. In a brief before the lower court, it is stated:

> "The only preferential right that is assumed to be given by the Act is that, for a thirty-day period the agricultural entryman shall have a right to apply."

The above is contrary to the express intent of the statute where the words are, "shall be entitled to a preference," and not, "shall have a right to apply." This position is further emphasized on pages 8 and 9 of respondents' brief in opposition to the writ, wherein it is stated:

> "Hardeman did not pay his fee within the thirty days during which a preference was by law granted to him, and for those reasons the Secretary denied his application. It is obvious that this is quite different from a case of the court undertaking to make a decree where there has been no application in the Land Department by one of the contending parties, for *non constat* the Secretary would have granted, or would now grant, the application of petitioner for a permit or lease. For a court to make a decree in the case at bar would interfere directly with the function of the Land Department which, because of the failure of petitioner to make application, has never had the opportunity to pass upon his claim and has never had the opportunity to decide between applicants . . . In the case at bar the court is asked to take over the duties of the Land Department before that Department has had an opportunity to perform its function of deciding between two claimants. Petitioner seeks to have the court do away with the necessity of application to the Land Department by petitioner and to deny all control, all jurisdiction, and all discretion to the Secretary of the Interior."

It is evident from the above, that respondents urge that the homesteader in section 20 did not have a vested right, but they consider that such right was contingent upon a subsequent application by the patentee. This argument was presented to the lower court. It is a clear statement of respondents' position and contains the gist of their reasoning as to why the United States is an interested party, requiring its presence. Upon the basis of this argument the lower court dismissed the suit, in the absence of the United States, for want of jurisdiction.

Petitioner submits that the above theory is not sound in principle. It is contrary to the decisions of the Land Department relative to the nature of the preference right. It is contrary to the decisions of this court, where similar vested property rights were involved. The preference right was an absolute right to immediate possession and enjoyment. It was not subject to contingencies, as no further event could make this right more certain or secure. Since it is assumed, on the issue of jurisdiction, that petitioner had a preference right, how can this fact be reconciled with the above reasoning that he must have filed application in order to acquire it, and then that it was within the Secretary's discretion to refuse to grant it? This confusion of reasoning arises from section 13 of the Leasing Act, providing for a preference right of thirty days to strangers to the title who complied with certain requirements of law contained in that section. The preference right of section 20 vested a property right in certain entrymen and patentees when the act went into effect, regardless of any future action on their part.

The fundamental difference between a section 13 application for a prospecting permit and one under section 20 of the act is, that, whereas, an application under section 13

of the act is one presented upon the basis of "first come first served," and is based upon mere privilege by any stranger to the title, the provisions of section 20 grant a preference right to such a permit to an entryman or patentee under the terms of such act and is not based upon mere privilege, but upon rights growing out of preexisting laws. No duty rests upon the section 20 preference claimant to act until he has been served with notice of an adverse claim.

The pertinent part of section 20 and the regulation for its administration are set forth on page 11 of petitioner's brief in support of the writ. The language contained therein, "the patentee shall be entitled to a preference right to a permit," is mandatory. This language vested a right *eo instanti* when the act went into effect. This property right could be divested by an adverse applicant only by compliance with the provisions of law as to personal notice, whereupon the landowner had thirty days to exercise his right. No application was necessary and no time limit is placed upon its exercise. Petitioner is supported in this reasoning by the decisions of the Department.

In the case of *Matt Mechaley,* 51 L. D. 415, it is stated:

> "Section 20 of the Leasing Act did not place any limitation upon the time allowed *any entryman* to assert a preference, and that limitation is governed wholly by the presentation of adverse application."

Again, in *Shaw v. Rink,* 50 L. D. 411, the Department holds:

> "Not only is notice by an applicant expressly required, but the situation is one in which no warrant would exist for a regulation permitting persons not

themselves of record as intending in good faith to develop the mineral deposits, to place upon a surface owner the burden of exercising a preference conferred upon him by statute. The section pre-supposes an adverse claimant over whom the *entryman is to be preferred;* and a regulation which requires that the entryman exercise the preference on penalty of a waiver thereof, would only be authorized if necessary to accomplish the purpose of the Leasing Act, i. e., to encourage persons to develop the oil and gas deposits as provided."

In defining the term "preference," the Secretary of the Interior states:

"The term 'preference' is a familiar one under the Public Land Laws and means *exclusive.* The right thus secured, therefore, is to the exclusion of other persons; and it is evident, without argument, that the duration and extent of a right of that character should be strictly governed by the statute. The exclusive right *can be enlarged or diminished by Congress alone."*

Chas. S. Morrison, 36 L. D. 126, 128.

In the case of *Charles L. Stevens,* 48 L. D. 110, it is held that written notice or notice by publication by any adverse applicant must be "served upon entrymen or owners having a possible preferred right to a permit."

The preference right to prospect of the landowner is not a mere personal privilege which may be ignored by the Secretary, as respondents urge. It is a vested right, not a contingent one. It was a grant *in praesenti,* not *in futuro.* Strictly speaking, it is in the nature of an incorporeal hereditament, which attached to and issues out of the land. It has the quality of inheritance. In its

nature it is analogous to the Soldiers' Additional Homestead Statute, section 2306, Revised Statutes, which provides that every person entitled under the provisions of section 2304 to enter a homestead, who may have entered a quantity of less than 160 acres, "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

The Land Department for years, in interpreting the above statute, assumed that it was a mere offer or privilege requiring acceptance. Regarding this section, the Secretary once held, in 46 L. D. 274:

> "The benefit of Section 2306, indeed, is not before its acceptance property at all, and hence is not capable of inheritance. It is a mere offer, which upon its acceptance by a designated beneficiary during his term of qualification as such becomes property and convertible into specific land by entry under it."

In *Anderson v. Clune* (1925), 269 U. S. 141 (70 L. Ed. 201), Mr. Justice Sutherland does not take this view. Referring to the Department's interpretation, he says:

> "This is plainly in the face of the decisions of this court in Webster v. Luther, and others. . . . The grant of the statute (Sec. 2306) *ipso jure* vests a property right in the donee which he may exercise or sell and transfer. A property right, the ownership of which may be conveyed to and vested in a purchaser, must be accorded the quality of inheritability, which usually attaches as an incident of ownership in the absence of some provision of law to the contrary; and we, therefore, hold that the Soldiers'

> Additional Homestead right, if not exercised or transferred by the donee, passes to his estate as other property."

The terms "shall be entitled" of section 20, and "shall be permitted" of section 2306, appear to be synonymous. The grant under section 20, in stating that the entryman or patentee shall be entitled to a permit to prospect upon land which he has entered or patented with mineral reserved, limits that right to land upon which agricultural entry has been made. It is even stronger than the grant of section 2306, "shall be permitted," which authorizes an entry anywhere on the public domain, and which perforce is subordinate to prior rights in any specific tract of land. The other cases cited by the court in this decision support this same doctrine.

The assignment clause in section 20 does not modify the principle that the preference clause conferred a vested right and that it was inheritable. The Land Department takes this view of its application, as shown by *Fraser and Harvey*, 48 L. D. 237, in which it is explained that this clause was intended to restrict or describe the beneficiaries, and not to limit or restrict the nature of the right granted therein. The decision states:

> "I am clearly of the opinion that Congress did not intend to modify or limit the right of assignment of desert land entries conferred by existing law, or to deprive an assignee under that law of any right or privilege which said laws confer upon the original entryman.

"The foregoing is in accordance with the thought that the preference, except as to assignments made prior to January 1, 1918, is to be conferred only upon those who are required to earn title by residence, cultivation, improvement, or some other act required by the applicable law. *The widow, heirs, or devisees of a homestead entryman,* and the heirs or assignees of a desert land entryman, are the successors of the original entryman, and are within the class entitled to the preference right provided for by said Section 20, since they are allowed by law to complete the entry by compliance with the applicable statute."

IV.

Section 20 of the Leasing Act Is Mandatory.

The language used by the statute conferring the preference right, viz.: "shall be entitled to a preference right to prospect," is mandatory. Failure to comply therewith vitiates the action taken. There is no discretion which the Secretary can exercise in issuing it. The United States, speaking through the Congress has made its selection of permittee. The only duty imposed upon the Secretary was purely the ministerial one of issuing the permit to its designated permittee and lessee. Since it is assumed, for the purpose of determining this issue of jurisdiction, that petitioner had this vested property right, how can it be urged that any discretion of the Secretary is involved? If the proprietor, being in this instance the United States, as lessor, had made its selection of permittee and lessee, how can it be urged that the United States will be injured by a judicial compliance with the

terms of the law? This requirement was so essential a part of the plan that the legislative intent was frustrated by noncompliance. In our opinion, the reasoning of Judge Sibley, in *Witbeck v. Hardeman, supra,* is conclusive, and it is fully applicable in the instant case.

There is no merit in the suggestion that the Secretary's consent was required to an assignment by the permittee or lessee, and that, in the absence of his consent, any assignment by operation of law interferes with the functions of the Land Department. This question of assignment of an oil lease, in which the United States was the lessor, was passed upon by the Supreme Court of Montana in 1931, and that court dismissed such contention. We quote from that case entitled *"Hockman v. Sunhew Petroleum Corp."* 11 Pac. (2d) 778, at page 781:

> "It (a permit or lease) is unquestionably a property right, which in some instances may be very valuable, and to permit the holders of such leases to claim such property as exempt from the just demands of creditors was never intended. The United States Government would not lend itself to such fraud and from a simple reading of the Act regulating the execution of such leases it is manifest that it was within the contemplation of the law that transfers of such leases could be effected by 'judgment or decree' without the necessity of first obtaining the consent of the Secretary of the Interior."

The above decision is in accord with *Alaska Oil Felds v. Rains, supra,* and *Witbeck v. Hardeman, supra,* in which the same question was determined.

V.

The Substitution of Petitioner Would Not Interfere With the Functions of the Land Department.

On pages 18 and 19 of respondents' brief in opposition to the writ it is stated that entering a decree in favor of petitioner

> "would interfere directly with the functions of the Land Department, . . . as the Petitioner would be given a lease over an area twice as large as he would be entitled to as a matter of right, if he had in the first place had a prospecting permit."

In other words, respondents urge that petitioner was entitled to a permit and lease for only 160 acres, and not for the 320 acres embraced in his homestead. In this connection we think respondents are clearly mistaken. Where can any words be found in section 20 of the Leasing Act limiting the preference right to 160 acres? The statute provides that the entryman and patentee "shall be entitled to a preference right," and the only limitation is the acreage of the land so patented, and that it shall "not exceed 2,560 acres for the purpose of making joint application." Since the words conferring this preference right are mandatory, no discretion is involved. In accordance with the terms of the law, petitioner would be entitled to a preference right to prospect on all the lands so patented with restricted title. In case discovery of oil was made on neighboring land by another, so as to bring petitioner's land into a known geologic structure, he was entitled to a lease for his own particular land. Not only is this the clear meaning of the statute, but it has been so applied by the Land Department under such circumstances in *Matt Mechaley, supra,* from which we quote:

> "The exception as to preference lease is broad enough to include a lease under Sec. 20 of the Act, and there is no apparent reason why the fact of a discovery of oil upon a geologic structure which includes land of an entryman who, except for that discovery, would have a preference right to a permit, should operate to deprive him of all claim to the oil and gas deposits."

The sole question remains: Was petitioner entitled to a preference right to a permit and lease? If he was, then he was entitled to such permit for the 320 acres in his homestead. In determining this question, we are concerned solely with the mandatory character of the language used in the act and are not concerned with the percentage of royalty which was to be paid to the United States under the ministerial regulations subsequently adopted by the Land Department, this percentage depending in its application upon whether the discovery was made upon this particular tract, or upon an adjoining tract of land. That is a different question.

Royalties.

In announcing the theory quoted above, respondents have confused the language used in sections 13 and 14 of the act with the language used in section 20, and have not observed the clear distinction made by Congress. Section 13 of the act authorizes the granting of licenses to qualified applicants to prospect for oil upon the public domain, wherever the lands are not known to contain oil deposits in commercial quantities. In section 13, the words used—

"the Secretary is hereby authorized"—are permissive in character. In distinction, the words of section 20—"shall be entitled"—are mandatory. These provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the distinction between applicants for mere privileges as under section 13, and those persons who deserved special consideration in connection with rights acquired under pre-existing laws.

Petitioners' preference right to all of the 320 acres, as provided in section 20 of the act, is not modified or changed by anything contained in section 14, which states:

> "The permittee *shall also be entitled to a preference right* to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount of value of the production, and under such other conditions as are fixed for oil or gas leases in this act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe." (Italics ours.)

From the above it will be observed that the discretionary power of the Secretary *relates solely* to the method of determining the royalty and not to petitioner's right to the lease itself. The mandatory provision above states that the permittee shall be entitled to a preference right for a lease to the remainder of the land in the prospecting permit. These are words of command.

Discretion.

The only discretion granted the Secretary is in the method of fixing the royalty, and not in reference to the preference right. The act fixed the royalty at not less than one-fourth the acreage within the permit upon which the discovery was actually made at five per cent, and the remainder of the acreage within the permit at not less than 12½%. The act provides discretion only to have the royalty determined by competitive bidding, or by resorting to general regulations affecting such royalties. In case of competitive bidding, the permittee had the right to equal the bid, or otherwise the preference clause becomes meaningless. In practice, the Secretary has never resorted to competitive bidding to determine the amount of royalty, nor could he do so, so long as the regulations adopted shortly after the act went into effect, and which became a part of the law, remained in force. These regulations provide, in paragraph 8 thereof, for the amount of royalties to be paid, and any permittee or lessee may rely upon this regulation as being a part and parcel of his permit:

> "Upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered . . . the permittee is entitled (a) To a lease of one fourth of the land included in the permit, on a royalty of 5 per cent, or for at least 160 acres if there be that area in the permit; (b) to a preference right to a lease for the remainder of the land covered by his permit at such royalty as may be fixed by the Secretary of the In-

terior, not less than 12½ per cent in amount or value of the production, nor more than the royalties fixed for leases under section 18 of the Act (sec. 19, par. c, of these regulations), except that on that portion of the average production exceeding 200 barrels per day per well for the calendar month, the royalties shall be 33-1/3 per cent for oil or 30 degrees Baume or over and 25 per cent for oil of less than 30 degrees Baume."

The point is, the Secretary had the discretion to choose as to whether he would fix the royalties by competitive bidding, or by a sliding scale. Having chosen the sliding scale, each permittee took his permit with the knowledge and upon the assurance that the royalties would be so calculated, and this selective method by the Secretary became, by relation and adoption, a part of the general regulations upon which all persons had the right to rely, and upon which their property rights became fixed.

Since the language granting petitioner a preference right to prospect was mandatory as to the total acreage in his homestead, the royalty he would be required to pay would be determined by the above regulations as a part of the law applicable alike to all permittees. The respondents are required to pay the United States 12½% royalty upon the 320 acres involved in this suit, in accordance with this regulation. In substituting petitioner as lessee for this land, he would pay the same amount, as a discovery was not made upon this particular section of land.

The prayer of the complaint states:

> "That defendant Pacific Western Company holds title to the hereinabove described lease for this plaintiff in so far as said lease affects the property described in this complaint."

From the above, it is self-evident that there is no interference with any discretion of the Land Department. What petitioner asks is simply a substitution in which the Secretary could exercise no discretion under the mandatory provisions of law in issuing the lease, or the regulations in fixing the amount of the royalty to be paid.

In concluding the discussion on the issue of jurisdiction, we respectfully submit that the authorities cited clearly establish that the United States is not interested in the litigation, and it is not therefore an indispensable party.

VI.

The Decision of Jurisdiction Controls Other Issues.

The Court having determined its jurisdiction and in connection therewith, that the preference right to prospect conferred by Section 20 of the Leasing Act is a vested property right *in praesenti,* it is necessary to consider briefly the far reaching effect of this determination upon other issues in this case. These questions raised on the merits are all issues of law.

As a matter of law the issue of laches which *presupposes the existence of a preference right,* is disposed of for the following reasons:

1. There is no evidence of laches in fact since respondents made no attempt to prospect on petitioner's land prior to the filing of suit on July 1, 1931.

2. Petitioner was in the undisturbed possession of his land vested with a preference right to prospect until May 11, 1933, and no question of laches could arise as a matter of law.

3. Petitioner was under no duty to act until disturbed in this possession.

Ruckman v. Cory, 129 U. S. 387;
Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

4. There is no evidence that the delay of eighteen months after learning of the issuance of a lease covering his land before filing suit, resulted in any prejudice to respondents. If there was prejudice, it was of respondents' own creation.

Standard Oil v. St. Oil Co., 72 Fed. (2d) 524;
Neal v. Hodges, 13 Fed. Supp. 916.

5. Petitioner being vested with the preference right to prospect, this property right could have been divested only by compliance with the provisions of law as to notice and bond. This was not done. Hence, as a matter of law, respondents cannot invoke the defense of laches, even if there had been any laches in fact.

Not only does the decision on jurisdiction eliminate the question of laches, but it affects all the issues on the merits, as we shall see hereafter.

VII.

The Preference Right Vested Only in Entrymen and Patentees Subject to the Act of July, 1914.

The determination that the Court has jurisdiction and that there is no discretion in the Secretary since it is a vested property right, also establishes the identity of the entrymen and patentees under the law in whom this right vested. Such entrymen and patentees necessarily were subject to the Act of July, 1914, (App.), which was the only measure which restricted oil. Anything in the regulations to the contrary is invalid and without force or effect, being inconsistent with the provisions of law. In practice no such regulation has been observed. In the *Krushnic* case below, the same regulations in respect to Section 37 of the Leasing Act were held to be "in plain violation of law" in that it disregarded the mineral land laws.

U. S. v. George, 228 U. S. 14;
Wilbur v. Krushnic, 280 U. S. 306.

The preference right of Section 20 is predicated upon the provisions of this Act. This is clear both in fact and

law, since the prospecting right could not vest in an entryman or patentee unless oil was restricted at the time of entry, nor could Congress have conferred the right. Congress would have had nothing to grant, as otherwise the entrymen and patentees had title in fee. The preference right vested in entrymen and patentees with oil restricted by this law when the Leasing Act went into effect on February 25th, 1920.

Since all preference rights are predicated upon the Act of July, 1914, such right must be derived from this Act. Hence, we must look to its provisions to determine the rights of these beneficiaries. Under its provisions all entrymen and patentees acquired title to all mineral except oil. They were permitted and urged to submit evidence of the non-mineral character of their land at the time of entry, in order to acquire title to any prospective oil by receiving a supplemental or unrestricted title therefor. There is no evidence that such supplemental patents were issued as required by law. If Section 20 is to be considered a relief measure as urged by respondents, although there is nothing in the law suggesting that it is, we must look to the inequities in the administration of Section 2 of the Act of July, 1914, to find any occasions for relief. It may be considered that entrymen and patentees subject to the Act of July, 1914, who insisted that their land was non-mineral in character, and submitted convincing evidence to establish that fact, had a claim which was recognized by Congress in Section 20 in conferring a preference right to prospect upon such landowners. The purpose of Section 20 was to preserve preexisting rights. We submit that such entrymen must be recognized both in equity and as a matter of law as the true beneficiaries under the provisions of Section 20 of the Leasing Act.

No entryman or patentee under respondents' theory has a preference right to prospect under Section 20, if an executive order is construed to be a withdrawal as mineral and a classification as mineral *ipso facto* of the land affected, as urged by respondents and decreed by the trial court, contrary to the decision of this Court in the *Stockley* case cited below. This conclusion of law is assigned as error in the sixth, seventh, and sixteenth assignments [R. 335]. Such construction destroys the preference right of all entrymen affected by such orders, as we shall see hereafter. On the other hand, if the order is given its natural meaning, "for classification" or a "report of value", i. e.: "a suggestion of the propriety of an investigation", in the words of this Court, the petitioner's, as well as the rights of other entrymen, are preserved. This meaning should be applied uniformly.

Thomas Stockley (1915), 44 L. D. 178;

Stockley v. United States, 271 Fed. 632;

Stockley v. United States (1923), 260 U. S. 531, 67 L. Ed. 390;

Benjamin Kohal (1923), 49 L. D. 460;

Lane v. Hoglund, 244 U. S. 174, 61 L. Ed. 1067, at 1068.

Stated in the affirmative *the sole question at issue under Section 20 is whether petitioner's land was determined to be non-mineral in character at the time of entry* subject to the Act of July, 1914, so as to entitle him to a preference right. Respondents maintain that his affirmative right was defeated *by reason of an executive withdrawal "for classification"* issued some years prior to entry. In practice similar executive orders have not defeated the prefer-

ence right of other entrymen. Why should it do so in the instant case? This is discussed under "Respondents' theory."

Divergence of Theories.

Respondents deny the above conclusions, as we understand their theory, and assert that it was only by reason of "drastic executive orders that classified and withdrew land as mineral" at the time of entry that gave rise to equities [R. 258]. The gist of respondents' "equitable" theory is, that on the date of application, there was no *specific* oil reservation in the application of some entrymen, and because this reservation was inserted at the time of entry by virtue of these orders, such entrymen and patentees, and *no others,* are entitled to its benefits. Petitioner admits the existence of such a class of entrymen as described above, but denies that this is the class described and referred to in Section 20 as beneficiaries. We deny that this class had equitable claims or legal rights under Section 20 according to their own theory, and we deny in any event that its terms should be so narrowly construed as to *exclude* all others regardless of their just claims under the law.

As a matter of law, the above theory is not sound. The preference right to prospect granted to the homesteader in Section 20 was a vested property right *in praesenti.* It was not a grant *in futuro,* which in legal effect, would have held out an offer to the landowner to a right to prospect, if at some future time he waived title to oil in favor of the government and later made application therefor. In such a case the preference grant would not be a vested one, but a contingent interest dependent on

some future act. Respondents, therefore, deny that the preference right was a vested interest *in praesenti,* and that it was predicated upon the Act of July, 1914, restricting oil.

From an equitable standpoint, we do not see the basis for this theory. It cannot be denied that, only in case they were unlawful entrymen, were they subject to an executive order at the time of entry. (App.) It is anomalous to consider that a so-called "equity" was intended exclusively for such entrymen. It cannot be denied that all applications for the entry of public land were made subject to classification and withdrawal as mineral land throughout the time of entry by operation of the mineral land laws. The entryman would have been required to waive mineral deposits upon the land being classified as mineral. This is fundamental public land law, applied throughout the years in question. It does not make any difference whether this reservation was express or implied, so long as the classification as mineral occurred during the time of entry. Nor does it make any difference by what agency this classification was actually made. If made, entrymen were not in consequence deprived of any legal right. A clear understanding of the above facts make it self-evident that, if land was actually classified as mineral at the time of entry by a "drastic executive order", or by any agency whatsoever, or withdrawn as mineral land by operation of the mineral land laws, then such entrymen have no grievance or claim to support respondents' equitable theory. They were deprived of no legal right. In fact, the Act of July, 1914, gave them something they did not enjoy before. Congress was familiar with the long established practice of classifying land at

the time of entry. *Ergo* it recognized in Section 20 the absence of any equities in the entrymen if land was actually classified as mineral at the time of entry by an executive order or otherwise, for it explicitly provided therein that such entrymen and patentees shall not have a preference right.

In practice, respondents' theory will not stand close analysis. It cannot be denied that many entries were canceled, both before and after the Act of July, 1914, was enacted, as shown by the regulations and Land Decisions. (See 39 L. D. 145.) Subsequently, new application was made subject to the Act of July, 1914, with oil restricted, and some such entrymen have been given a preference right by virtue of Section 2 of that Act. In these cases it is apparent that oil was restricted at the date of the new application, yet if such entrymen submitted proof of non-mineral character they were entitled to the grant of the preference right. This whole situation refutes respondents' theory and confirms that of petitioner. We will discuss more fully hereafter the incongruity of respondents' theory, part of which is apparent in the following:

COMMON TERMS HAVE A COMMON APPLICATION.

It is a self-evident truth that terms found in Section 20 and Land Office practice have the same meaning and application when used in reference to the alleged beneficiaries under respondents' theory, that they have when applied to the petitioner. There is no room for disagreement on this proposition. Yet much confusion in reasoning and error in legal conclusions have arisen by failure to recognize this simple truth. With this in mind we call attention to some of the terms used in the law.

The legal and practical significance of the terms "entrymen" and "patentees" are not questioned. An entryman is one who has a *pending entry,* and is complying with the provisions of law to secure title. It is plain that, under the statute, a preference right was conferred upon both entrymen and patentees subject to the Act of July, 1914, with oil restricted, as both terms are repeatedly used by Congress. Hence, not only did this grant of a prospecting right vest in a patentee if otherwise qualified, but also vested in an entryman subject to the Act of July, 1914. This would have been true even if the word "entryman" had not been explicitly mentioned as a matter of law under the doctrine of relation. It is a well established principle that:

> "Under the doctrine of relation all the rights acquired under the patent relate back to the entry or the date when the right was created."
>
> *United States v. Detroit Co.,* 200 U. S. 321, at 324.

In the instant case the right was created on February 25, 1920, when the Leasing Act went into effect. The petitioner was an entryman at that time. It is evident that Congress recognized this doctrine of relation in the statute by specifically providing that "entrymen or patentees", and then "entrymen and patentees" with restricted patents should be entitled to the preference right. The practice of the Land Department confirms the law in this respect and prospecting permits have been issued both to entrymen and patentees subject to that Act.

We agree, further, that Congress did not intend to grant all entrymen and patentees subject to the Act of July, 1914, the preference right, since it provided a limi-

tation or exception to this class by stating that the grant should vest only in entrymen and patentees whose land was not classified as mineral land at the time of entry or stated in the affirmative was determined to be non-mineral land at that time. The clause "at the time of entry" has often been interpreted and defined by the federal courts. In many decisions it has been held that:

> "The word 'entry' means not only the preliminary application, but the proceeding as a whole to complete transfer of title."
>
> *Chaplin v. United States* (1912, 9 C. C. A.), 193 Fed. 879, at 884;
>
> *Whitman v. Spear* (1925), 103 So. 668;
>
> *McCoskell v. Herron* (1905, Iowa), 103 N. W. 988;
>
> *Dealy v. U. S.*, 152 U. S. 539, at 545;
>
> *Hastings R. R. v. Whitney,* 132 U. S. 357;
>
> *Iddings v. Burns,* 8 L. D. 226.

The Supreme Court has stated repeatedly in the above decisions that:

> "Under the homestead laws, three things are needed to be done in order to constitute an entry on public lands. First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with and the certificate of entry is executed and delivered to him, the entry is made."

Petitioner made formal application on March 6, 1919. Subsequently by affidavits showing annual cultivation of

crops and improvements over a period of five years and payment of money required, a certificate of entry was delivered to him on June 8, 1925 [R: 297]. Whether or not petitioner's land was determined to be mineral or non-mineral during this time, is the question before the Court. It was during the corresponding period of entry that respondents urge that entrymen were "threatened with destruction by drastic executive orders." That the statute being construed means "the proceeding as a whole to complete transfer of title", and not simply "the date of preliminary application", is the basis of respondents' remedial theory, and this meaning must be uniformly applied to this term. Their claim is, that during the time of entry, an oil reservation was inserted not specifically contained in the preliminary application by virtue of such orders.

In statutes words are to be given their ordinary meaning. Funk and Wagnall's, as well as other dictionaries, define "at" (the time of entry) as "during", "within", "in reference to", "present in". The antonyms given are "prior to", "before", "thereafter". In this connection it is pertinent to note that respondents urged, and the trial court found, that the statute means "prior to and at the time of entry" [R. 323]. We think what may have been done ten years prior to the date of application is irrelevant. If we accept the Court's construction, however, (although we do not agree) that the words mean both "prior to and at the time of entry", the result is the same in determining the beneficiaries under the law. The point is that it means the same thing in all instances and must be similarly applied.

It is apparent that, since the grant vested only in entrymen and patentees subject to the Act of July, 1914, and

since this Act provided in Section 2 thereof for the determination of the mineral or non-mineral character of the land during the time of entry under the Act, it could have no other meaning or application. As rights are derived from the provisions of this Act and the Act under which entry was made, we think this meaning is not open to controversy. It has always been the practice of the Land Department to determine the character of land, whether mineral or non-mineral, at the time of entry in accordance with the above definition, as this continuing period lasts usually from three to five years after the date of application. The Regulations state that the classification was made at the time of entry and that this was a "subsisting" or continuing period. Courts have confirmed this practice by recognizing that this was the preferable time for making the determination. Congress likewise has recognized this practice and provided for this determination during the period of entry, not only in Section 20, but in the Act of July, 1914, and many previous statutes. If we apply this meaning, which is the foundation of respondents' theory, to petitioner, then his patent establishes the fact conclusively that, at the time of entry, his land was found to be non-mineral. Upon this determination he unquestionably is entitled to a preference right, and no further question need be considered.

As we understand, respondents concede that petitioner is entitled to a preference right except for the executive order of December, 1910, ten years prior to petitioner's application, which "temporarily segregated the land for classification". The Geological Survey certified that the land was not classified as mineral during the intervening years [R. 158]. The Register of the Land Office states that the agricultural character had never been challenged

[R. 132] and that the Secretary had never made an adjudication of mineral character as shown by the records. The whole official record shows that it was non-mineral. (See history of land, p. 4.) Contrary to the uniform decisions of the Land Department holding that the above order imported no classification and "does not raise the presumption that the land is mineral" (Franden 50, L. D. 520) and the decree of the Supreme Court that it was not even a challenge to the agricultural character of the land involved, respondents urged, and the trial court found, in order to defeat petitioner's right, that the above words should be construed to mean that it had actually been classified as mineral land ten years prior to application and in effect, that the Secretary's determination of non-mineral character at the time of entry should be disregarded.

We submit that the above conclusion which we have assigned as error [6, 7 and 16, Assignments, R. 335] is contrary to law, and without any support. If we assume that it is correct, however, bearing in mind that this same meaning and application is to be made to all entrymen whose land was "classified and withdrawn as mineral by drastic executive orders" at the time of entry, then let us consider the legal effect of such a strained construction upon respondents' equitable theory. If the effect of such an order was to *actually* classify and withdraw as mineral the land affected, they, the entrymen, under respondents' equitable theory would have no grievance in equity, or legal right under Section 20 for their land was subject at the time of entry to such classification, regardless of the particular agency employed to do the classifying. The statute provides clearly that, under these cir-

cumstances, they shall not have a preference right. It is apparent that it is futile for respondents to apply this unique construction to an executive order as it simply defeats the purpose intended. If entrymen, however, during the time of entry, were affected by an order "for classification", and this ordinary meaning is given to the words used, their right would not be lost, as both in equity and law they would be eligible to a preference since their land in consequence would not have been classified as mineral at the time of entry by such order.

It is only by accepting the law and fact that an executive order was "for classification" as stated plainly in the order, and not a classification as mineral *ipso facto* as held by the trial court, that any entryman and patentees can be eligible for a preference right. By this means only can *any equitable theory* be reconciled with the provisions of law, the uniform decisions of the Land Department holding that an executive order was not a classification (cited hereafter), the opinion of the Supreme Court stating that it was not a challenge to the agricultural character of the land in the *Stockley* case, *supra,* and the dictates of sound reasoning. The trial court's conclusion that such an order was in itself a classification as mineral, results in eliminating the preference class. Equity follows the law in the application of the statute. *It is the very fact that it did not amount to a classification as mineral that gives any entryman an equitable claim or legal right.*

Congress recognized this situation and provided in each section of the Act of July, 1914, that a citizen may make application under that law for land alleged to be valuable (reported as valuable) with oil reserved. In this Con-

gress recognized that much of the land had never been classified or withdrawn as mineral land. If it had not so provided there could be no preference class. In practice, the Land Department has conferred a preference right under Section 20 to entrymen of such land by reason of Section 2 of that Act. The meaning of land "reported as valuable" must be uniformly applied and not be treated as a classification in order to deny petitioner his legal right. [R. 335, 8th Assignment.]

VIII.

Petitioner's Case.

QUESTION: Whether a homesteader's preference right to prospect under Section 20, on land determined to be non-mineral in character at the time of entry, is defeated by an executive order "for classification" issued prior to entry.

It is agreed that the preference right is based upon rights growing out of preexisting laws. Petitioner's right is founded upon the provisions of the Act of February 19, 1909 (App.), requiring the Secretary to find at the time of entry that such land is "actually" non-mineral in character before he may issue a patent thereunder. The patent was issued subject to the Act of July, 1914. Petitioner's affirmative rights under Section 20 are based upon the provision of these laws, which show conclusively the non-mineral character of his land at the time of entry. These rights are not defeated by an executive order temporarily suspending land "for classification" issued "prior to entry". The statement of facts contain the history of petitioner's land as found on page 4 herein and will not be repeated.

The trial court found, "that plaintiff filed application and made entry in accordance with the provisions of the Act of February 19, 1909." [R. 252.] This Act provided that the Secretary, at the time of entry, must determine that the land so entered is non-mineral, "that the land is actually of that character," and that he may not issue a patent otherwise (App. Secs. 218 and 220). This determination was not to be made in a "popular sense" by calling it "Petroleum land" as decreed by the trial court, but in compliance with the mineral land laws. [R. 252.] At that time the Register of the Land Office issued a certificate stating in effect that this land was non-mineral. [R. 296.] Petitioner made affidavit at the date of application that the land was non-mineral in character. This affidavit was corroborated by two disinterested witnesses familiar with the land in question, and a penalty was provided in case the affidavits were false. [R. 295.] The regulations of the Land Department required the entrymen further to submit this evidence and other evidence of its agricultural character.

The whole official record confirming the character of this land as non-mineral was before the Secretary. This record showed its agricultural character from the earliest time down to the time of entry and that there had never been a challenge to its agricultural character. Official records published by the Department in 1910 and again in 1916, showed it to be non-mineral. Both the Geological Survey and the Register of the Land Office certified that it was agricultural. [R. 267.] The official record showed further that this land had been classified as agricultural on June 17, 1908 and that no other classification had ever been made (App. 1), and that when other land in the same gen-

eral region had been "withdrawn as mineral land" by operation of the mineral land laws (not an executive order), it was classified as agricultural [R. 161]. One witness, however, testified at the trial that he "considered an executive order" for classification was a classification as mineral *ipso facto*. Obviously this was an afterthought as he did not consider it so in 1916 when he compiled the official record and had all the facts before him, for at that time he stated positively that it was not so classified. [R. 267.] His conclusion is contrary to the uniform decisions of the Land Department (Examples 40, L. D. 321, and 41, L. D. 145 at 147) and the decision of this Court rendered in 1927 in the *Stockley* case (*supra*). His changed position, however, is relied upon by respondents, to overcome all the facts established by the above record.

AFFIDAVITS.

If we assume, however, that none of this official record was before the Secretary, then the facts as established by the affidavits, would be fully determinative of its non-mineral character at the time of entry as a matter of law. The Land Department has stated on many occasions that the facts are proved primarily by the affidavits and that they are the basis of the entrymens' rights. The federal courts in the cases cited hereafter, have held that in the absence of a "contest or protest" the Land Department relies on the affidavits in determining the facts before issuing patents. Beginning in Volume One, Land Decisions, under the index heading "affidavits" and continuing thereafter, this practice and significance is recognized. It still holds true, as the mineral land laws have not been changed. We are not dependent on Land Office practice,

however, as the federal courts have long recognized this practice in their decisions.

In the instant case petitioner made oath that the land was non-mineral in character, and two other witnesses who were acquainted with the land likewise made oath to the same facts. Five years subsequently petitioner and two witnesses made additional affidavits as to the facts when a certificate of entry was issued. At this time the Register issued a certificate that the land was non-mineral. [R. 296.] All the statutes provide that the affidavits, when filed, shall be *prima facie* evidence of the facts stated. It is to be noted that these affidavits may not be filed on information and belief but must be based on personal knowledge. As a matter of law, the presumption of non-mineral character raised by this evidence, together with the Register's certificate of non-mineral character, overcome any possible presumption arising from a prior executive withdrawal "for classification". This presumption of non-mineral character was verified and made conclusive by the issuance of patent as a matter of law. Let us review a few of the numerous authorities. This Court confirms the above principles in the case of *Adams v. Church* (1903), 193 U. S. 510, wherein it states:

> "The affidavit required of the entryman at the time he applies is identically the same as that required at the time he makes his final proof. It is the policy of the government to require such affidavits when it intends to make it a condition precedent to granting a title."

Again in the case of *U. S. v. George, supra,* it is stated:

> "These facts, it is alleged in the indictment were matters of material inquiry of the good faith of the

> defendant in perfecting his homestead entry . . ." "The facts to be proved as required for the issuance of patent, are proved by the affidavits" . . . "In other words, the section is not only explicit as to what is to be proved, but in what manner proved; and what is required of the claimant himself, to-wit, an affidavit is distinguished from what he himself must establish by others, to-wit, two credible witnesses."

Justice Miller in *U. S. v. Minor,* 114 U. S. 232 at 240, declares that the Land Department is compelled to rely on the proof presented in the affidavits and the good faith of the entryman in meeting the requirements of the law. In effect this is repeated in the case of *Leonard v. Lennox,* 181 Fed. 760, at 764-768) and declared further that in the absence of fraud, the character of land whether mineral or non-mineral is determined in accordance with the terms of the affidavit of the entryman.

A patent is the confirmation of the record evidence, including affidavits necessary to the transfer of title and is the final judgment of the Secretary and the land officials and as such is not open to collateral attack. The above principle is well established by the following cases: *Neff v. U. S.* (1908), 165 Fed. 273, at 277; *U. S. v. Winona R. R.,* 67 Fed. 948 at 958; *Hastings and Dakota R. R. v. Whiting,* 132 U. S. 357, at 366; *U. S. v. Smull,* 236 U. S. 405; *Hawley v. Diller,* 178 U. S. 478; *State of Louisiana,* 30 L. D. 627.

Good Faith.

In our opinion the good faith of the petitioner is no longer in issue. This is a question of fact. The trial court found that petitioner acted in good faith in entering the land as agricultural land, and there is not a syllable of evidence to the contrary. [R. 252.] No appeal was taken from this finding. Respondents now urge, however, that he did not act in good faith because he did not believe that he would secure title to any prospective oil rights. To state such a novel proposition in indicative of the extreme position to which respondents are reduced to find some means of defeating petitioner in his right. We will discuss this matter briefly.

The Regulations setting forth the requirements for a preference right state in Sec. 12 thereof:

> "(2) The entry must have been bona fide under and pursuant to the act under which made"

The Act of Feb. 9, 1909, under which entry was made, provided for agricultural entry when the Secretary determined that the land was "actually" non-mineral in character. The Act of July 17, 1914, authorized this form of agricultural entry; the issuance of patent is proof of a *bona fide* entry and a *bona fide* compliance with the homestead (agricultural) laws. Can any better case of a *bona fide* agricultural entry be imagined than where the entryman waived any prospective oil right? If we consider the converse proposition it becomes self-evident that the *male fides* of an agricultural entryman would be indicated by

his refusal to do so. The law on the subject is well established. In one of the early decisions it is held in effect:

> "If the entryman has complied with the terms of the law, and the oath required of him upon making such entry, his good faith is shown and nothing will defeat his claim."
>
> *Myers v. Croft,* 80 U. S. 291-20 L. Ed. 562.

Justice Brewer states the rule succinctly in *Anderson v. Carkins,* 135 U. S. 483; in these words:

> "the facts must conform to the affidavit to show the good faith of the entryman."

Again, it is held that, "the *bona fides* of an entryman is established by his affidavit." *Williamson v. U. S.,* 207 U. S. 425 at 458. That the patent is a verification of the facts set forth in the affidavit, and the facts as well as the good faith of the entryman is established thereby is held in numerous decisions from which we cite the following:

U. S. v. Hearing (C. C., Oregon), 26 Fed. 714 at 746-749;

U. S. v. Nelson, 199 Fed. 464 at 471;

U. S. v. Morehead, 243 U. S. 607;

Hawley v. Diller, supra.

These authorities denitely dispose of the question as to whether the land was entered *bona fide* as agricultural, although there is no evidence to the contrary and the court so found.

CONCLUSIVENESS OF PATENT.

It is not open to question that the Secretary performed his duty in determining the non-mineral character of the land at the time of entry in accordance with the convincing evidence submitted by petitioner and the law under which application was made.

> "Under the rule that public officers are presumed to do their duty, the presumption is that all necessary preliminary steps have been taken and determined."
>
> *Peabody Mining Co. v. Gold,* 111 Fed. 819;
>
> *U. S. v. Beaman,* 242 Fed. 876.

The Register of the Land Office certified at the time of entry that the land was non-mineral and the patent recites [R. 300]:

> "It appears that pursuant to the Act of Congress—the claim of Jean Bourdieu has been established and duly consummated in conformity to law."

The only legal conclusion from the above is that petitioner's land was determined to be non-mineral in character at the time of entry. Congress made this requirement for land subject to entry under the law of Feb. 19, 1909, by amendment in 1915 after the Act of July was in effect, which indicates that Congress did not intend to modify the provisions of that law relative to the effect of the affidavits as evidence of non-mineral, and the duty of the Secretary in determining the "actual" non-mineral character of the land. As a matter of law, this determination would supersede any prior action to the contrary if such existed, although there was no such action.

"A decision rendered by the Land Department upon a question of fact is conclusive and not subject to be reviewed by the courts."

Johnson v. Riddle, 240 U. S. 467;

"Where a mixed question of fact and law is involved and the court cannot separate it so as to ascertain what the mistake of the law is, the decision of the Land Department is conclusive."

Whitcomb v. White, 214 U. S. 15.

Even without such conclusiveness, however, the patent would control in that from its very nature it is a confirmation and approval of the facts necessary for the entry and then its issuance. The following cases from the Supreme Court are emphatic, clear and decisive as to the binding effect, confirmation and conclusiveness of the facts set out in the patent.

St. Louis Smelting Co. v. Kemp, 104 U. S. 636 at 640;

Steel v. Smelting Co., 106 U. S. 447;

Knight v. Land Assoc., 142 U. S. 161, L. Ed., 984 and 989;

U. S. v. Oregon R. R. (9th Circuit), (1911), 186 Fed. 861 at 885;

Cowell v. Lommers, 21 Fed. 200 at 206;

Bardon v. Nor. Pac., 154 U. S. 288 at 1001, L. Ed.;

Burke v. Sou. Pac. (1913), 234 U. S. 1527 at 1547 and 1550, followed in 9th C. C. A. 277 Fed. 794;

West v. Standard Oil (1928), 278 U. S. 200 at 210.

The agricultural land laws have long provided for the reservation of any specific mineral that might be contained therein to the United States. Restricted patents are issued in derogation of the agricultural character of the land. The Act of July, 1914, and subsequent legislation enacted by Congress show that this was the policy adopted so as to conserve any specific mineral to the United States for future use, regardless of the present character of the land. In the instant case the land was at all times open to discovery and the mineral land laws remain intact. The above policy is shown by the disposition of many railroad grant lands and the Act of March 3, 1909. The public lands of Oklahoma and Kansas are subject to disposition only under the agricultural land laws, yet the Acts of July, 1914 and February, 1920, extend to these lands. The Leasing Act is held to extend to public lands reserved as national forests which are non-mineral lands (31 Op. Att. Gen. 433). Railway grants and rights of way are agricultural lands. Lease of right of way owned by the United States for oil is subject to a preference right to prospect by the railroad or adjacent owner (May 21, 1930, 46 Stat. 374). To a large part of the land subject to the Act of July, 1914, no executive order had ever issued or attached.

The fact therefore that a patent issued under a law requiring the "actual" non-mineral character of the land to be determined at the time of entry, should contain a clause reserving any oil that might be found thereafter to the United States does not make it mineral land in compliance with the provisions of the mineral land laws. Congress provided as a *sine qua non* to the preference right that the patent contain this reservation. This reservation therefore clearly cannot negative the effect of the affidavits

and other evidence, nor the legal duty imposed upon the Secretary, and the confirmation of the whole proceedings by the issue of patent. It is an axiom of the Land Department that no land can pass to patent until its character as mineral or non-mineral has been determined and that in the absence of a mineral classification, it passes to patent as agricultural land. (*Deffeback v. Hawke*), 115 U. S. 392.

Congress provided further, that entrymen, subject to the Act of July, 1914, Section 2 thereof, should submit evidence of the agricultural character of the land at the time of entry. The regulations of the Land Department required the Secretary to consider this evidence and to issue an unrestricted patent if the agricultural character was established. Petitioner submitted such evidence. The practice of the Land Department, as disclosed by its regulations, however, shows, "that notwithstanding this evidence of agricultural character", a supplemental patent in many instances was not issued, although in some cases it was waived [R. 191]. It was for this reason that Congress provided in Section 20, in effect, that, in lieu of the supplemental patent, the entrymen or patentees should have a preference right to prospect on their homesteads if patented with title restricted. If Section 20 is to be construed as a relief measure, as respondents urge then it was by reason of the inequities growing out of the administration of Section 2 of the Act of July, 1914, in failing to issue this unrestricted patent to entrymen and patentees whose land was shown to be non-mineral. This is clear since the preference right is predicated upon the provisions of this Act restricting oil, and all rights must be derived from its provisions and the law under which entry was made.

Sec. 2 of the Act of July, 1914, provided that the entryman may show by evidence that his land "is in fact non-mineral" at the time of entry. Petitioner submitted this evidence. The Secretary considered this evidence and issued a patent under the provision of the law of February, 1909, confirming the fact that this land was "actually (in fact) non-mineral in character" as a matter of law. The Land Department then applied a Regulation which provided that notwithstanding this evidence of non-mineral a supplemental patent need not be issued. The above provision of law and fact clearly establish both the equitable and legal right of petitioner under Sec. 20, and the defense offered is irrelevant to determine the issues.

IX.

Respondents' Theory.

In the preceding heading we have established the affirmative preference right of petitioner by showing that his land was determind to be non-mineral at the time of entry. Petitioner comes within the preference grant of Sec. 20, unless it is shown affirmatively that he falls within the exception provided by Congress therein. Respondents have never question his right, except in so far as it is defeated by an executive order issued prior to entry. By construing this order issued on December 30, 1910, suspending land "for classification" as a classification as mineral *ipso facto,* and which established the character of the land as mineral not only prior to entry, but also at the time of entry, they deny his right under Section 20. We will prove herein that petitioner's preference right is not defeated by this order. If executive orders issued under the Pickett Act "for reclamation," for "power

sites," or "for classification" have not precluded other patentees, why should it do so in the instant case? This proof is made by giving the same legal significance to an executive order when applied to petitioner that is given when applied to establish respondents' equitable theory. Let us consider what this theory is.

Respondents consistently have urged that the lands of certain entrymen and patentees at the time of entry, "were withdrawn and classified as mineral by drastic and stringent executive orders which threatened them with destruction" [R. 259]. They have insisted throughout that it was to remedy this situation, resulting from these "inequitable executive orders", that Congress conferred upon such beneficiaries only in Section 20 of the Leasing Act, a preference right to prospect upon such entrymen's land. The burden of their complaint upon which they predicate their equitable theory is, that this classification as mineral resulting from executive orders, was not made prior to the date of application, but was at the time of entry. The trial court accepted this theory as appears from its opinion, conclusions of law, and decree, from which we quote. The Court states [R. 258]:

> "There were areas that prior to withdrawal or classification had been bona fide entered as agricultural land and on account of the later executive orders all rights of such entrymen were inequitably and seriously impaired and threatened with destruction . . ."
>
> "It was intended to relieve bona fide agricultural entrymen from the stringent, drastic and inequitable results of executive orders, that entirely withdrew and classified lands as mineral; . . . in order to carry out its intention and relieve bona fide agricul-

> tural entrymen who had made entries or obtained patents prior to the drastic executive orders . . . Sec. 20 of the Leasing Act of Feb. 25, 1920, *vested* such persons and only such persons with the preferential or exclusive right to prospect," etc.

The Court states [R. 258] and thereafter:

> "Executive orders that entirely withdrew and classified land as mineral . . ."
>
> "Executive orders that entirely withdrew land as mineral . . ."
>
> "The lands had been withdrawn and classified as mineral . . ."

The trial court repeatedly uses the above expressions in reference to land affected at some time by executive orders, either at the time of entry or prior thereto. In the above quotations "at the time of entry", is ingeniously concealed in some instances by the statement that entry (application) was "prior to the order and classification." The only time that an entryman could have been "threatened with destruction by a drastic executive order" as stated above was at the time of entry. Referring to petitioners' land, both the conclusions of law [R. 323] and the decree [R. 327] state that such lands:

> ". . . were withdrawn and classified by said Executive Order at the time of entry and prior to the time of complainant's entry . . . the lands were withdrawn from entry as petroleum lands and were classified as such . . . and if lands are withdrawn or classified as mineral at the time of entry, there is no preference right."

"Prior to and at the time of entry . . . (the land) had been and on that date they were withdrawn from entry as *petroleum* land and were also classified as such by an executive order dated December 30, 1910." [R. 327-331.]

The above statements reported in the findings of fact, opinion, and conclusions of law and decree, emphasize that, according to respondents' equitable theory, it was drastic executive orders which classified land at the time of entry, which was the situation to be remedied. If the order was issued at the time of entry, respondents urge the entryman is entitled to relief, and if prior to entry, as in the case of petitioner, he is not. In effect, the trial court found that both periods, "prior to and at the time of entry" were embraced within the expression "at the time of entry". [R. 323.] Without agreeing with the conclusion, we will assume, for the purpose of this discussion, that this was the intendment in accordance with the Court's conclusion and decree. The point is, the same meaning must be applied in all instances. It must include after the date of application, as that is essential to maintain respondents' theory that some "drastic executive order classified them as mineral" at that time, and that this was the situation to be remedied.

OBJECTION TO RESPONDENTS' THEORY.

1. Executive Orders did not classify land;

2. Executive Orders did not issue or attach at the time of entry unless the entry was unlawful;

3. Assuming the truth of the above premises, however, it merely proves that the alleged beneficiaries did not have a preference right.

1. We will discuss these errors of law in the order stated. Executive Orders did not classify land, since they "temporarily suspended land 'for classification' ", as stated in each Order. They did not in legal effect, *ipso facto* classify land as mineral or withdraw it as mineral land, which presupposes a classification. Such temporary orders operated simply as a static agent, which held land in *statu quo,* until it could be classified by a competent fact finding agency of government. [R. 164-174.] An executive order is fiat. A classification of land under the mineral or non-mineral land laws involved a determination of fact as to known mineral value. The manner in which these orders were issued affecting millions of acres in blanket form, often unsurveyed, before anyone had been on the land, makes it obvious that as to such lands there had been no determination of facts. The uniform decisions of the Land Department hold that the purpose of the order was to enable the Department to classify it at some future time, as stated plainly in the order, and the practice shows it. [R. 158-170.] These decisions cover the whole period from 1900 to 1916.

Johnson v. Northern Pacific (1911), 40 L. D. 321;
Holmes v. Kinsey (1912), 40 L. D. 557, at 558;
Jennie Tschirgi (1912), 41 L. D. 319, at 320;
Albert Woodhouse, 41 L. D. 145, at 147;
William Moses (1915), 41 L. D. 483, at 484;
George Frandsen (1924), 50 L. D. 516, at 520;
Benj. Kohal (1923), 49 L. D. 460.

The above decisions and many others show the uniform practice in this respect. Bulletin No. 623, printed in 1916,

containing all withdrawals, shows in every instance that the investigation or classification of the land was made subsequent to the issuance of the order. In the *Kohal* case above, in conformity with this Court's decision in the *Stockley* case, it was held that inclusion in a so-called "petroleum reserve" did not impress the land with mineral character. The practice of issuing withdrawals "for classification" is shown in the appendix by an order issued in 1935. The evidence is, that in all these orders involved herein the only classification possible was as mineral or non-mineral. In the instant case, both the Geological Survey and the Register of the Land Office certified that there had never been a challenge to the agricultural character of petitioner's land at any time. As a simple proposition of law, the first requisite to sustain respondents' theory is without any support in law or in fact. Bearing in mind that the same meaning must be applied in all instances, it is inconceivable that respondents should attempt to read into the words "for classification" an actual classification as mineral, when the only possible result of such construction is that these alleged beneficiaries can have neither an equitable or legal preference right in consequence.

2. The second premise is equally erroneous, as executive orders did not issue or attach at time of entry unless the entry was unlawful. All executive orders for classification were issued under the authority of the Pickett Act of June 25, 1910 (App.), which specifically provided: "There shall be excepted from the force and effect of any executive order, all lands embraced in any *lawful* homestead entry or upon which any valid settlement has been made." The Secretary stated in each order, that it was issued in strict accordance with the provisions of the

above Act, and there is no evidence to the contrary. The evidence shows that if there was an agricultural entry within the outer bounds of a blanket executive order, it was treated as a nullity and restored since it could not attach or affect the entry, as a matter of law.

Not only in law but also in fact, such "entrymen and patentees" were not affected by executive orders. There were twelve exhibits introduced in evidence [Nos. 15-27, R. 137 and 150-158] in which entrymen had received a preference right to prospect under Section 20, although their land was not affected by an executive order either "prior to or at the time of entry". No such orders were ever issued. This is convincing proof that executive orders did not classify land as mineral at the time of entry. It shows the fallacy of respondents' "equitable" theory for if these entrymen were entitled to a preference right, it was not by reason of "drastic executive orders that classified and withdrew their land as mineral" during the time of entry. Whatever was done was by operation of the mineral land laws to which they were subject at the time of entry. They became subject to the Act of July, 1914, by a "report of value" an allegation which has a well-defined legal meaning and is, in the words of this Court, "a suggestion of the propriety of an investigation" and not a classification.

It is clear therefore that these lands were not classified and withdrawn as mineral by an executive order as no such order existed. If they were classified and withdrawn as mineral at the time of entry by operation of the mineral land laws (or any agency), it is obvious that the preference permits in the above exhibits were issued contrary to Sec. 20. *In practice, therefore, the Secretary did*

not consider a "report of value" as an actual mineral classification as the respondents insisted in applying the term to petitioner. He gave it the legal meaning, the meaning that the Supreme Court gave it in *Lane v. Hogland,* and the *Stockley* case, *supra.* The 8th Assignment should be sustained. [R. 335.]

As stated above, if entrymen were affected by executive orders at the time of entry, or if such orders attached, it was only in case the entry was "unlawful" as provided in the Pickett Act, the sole authority for such orders. Exhibits Nos. 6-14 [R. 137, 142-148] represent entrymen whose land was subject to an outstanding executive order under the Pickett Act prior to the time of entry and which remained in effect at date of application [R. 144] who received a preference right to prospect under Section 20 of the Leasing Act. They illustrate that a temporary executive order was not a bar to a preference right if the entryman was otherwise qualified. These entrymen had made an unlawful entry on account of the provisions in the reclamation law. Subsequently, at the time of entry, another executive order "for classification" was issued and attached to their land because they were "unlawful" entrymen [R. 144]. As stated in the order, this formed the basis for a mineral waiver under the Act of July, 1914, "subject to the entrymen's right to prove at a hearing that the lands are in fact non-mineral" as provided for all entrymen subject to that law in Section 2 thereof.

We submit that *the land of these nine homesteaders who received a preference right, were affected by executive orders, both prior to and at the time of entry.* It is self evident, therefore, that if such orders *ipso facto,* "classified and withdrew their land as mineral" such

preference rights were issued in violation of Section 20. *If an executive order issued "for classification" at the time of entry did not defeat the preference right of these homesteaders, how can such an order issued ten years prior to entry defeat the petitioner?*

Obviously in issuing them by reason of Section 2 of the Act of July, the *Land Department recognized the difference between an order which segregated land according to a "popular meaning" by calling it "petroleum land", and an actual classification as mineral.* It is the difference between an allegation, report of value, or an expert's guess on the one hand, and a genuine classification in compliance with the mineral land laws on the other. If there is no distinction these homesteaders had no equitable claim or legal right under Section 20. *If there is a difference, they had both.* The decree is contrary to law in this respect [R. 337, 16th Assignment]. *By the same token, petitioner's right must be appraised. The practice, therefore, shows that an executive order at all times was simply a segregation "for classification"* and "not a challenge to the agricultural character of the land", in accordance with the decisions of the Land Office, and the opinion of this Court in the *Stockley* case (*supra*).

Upon applying the terms of respondents' theory to these facts, it is evident that Congress did not intend that a bare executive order should defeat the preference right. These instances prove conclusively that an executive order did not classify land as mineral, that the existence or non-existence of such an order did not determine an entry-

man's preference right. They prove that if the entryman had a claim it was by reason of Section 2 of the Act of July, 1914, which gave him a right to prove his land non-mineral. Failure to issue a supplementary patent in case of this proof is the sole equitable basis for the preference right.

3. In the face of this irrefutable evidence, even if we assume the correctness of respondents' premises 1 and 2, viz.: that the land of these alleged exclusive beneficiaries at the time of entry was classified as mineral by drastic executive orders, then it is obvious that they have succeeded only in proving that such entrymen and patentees were not entitled to a preference right since they would come within the express prohibition of Section 20. No authority need be cited for the proposition that a construction which renders a statute absurd should not be adopted. A theory or practice which negatives the explicit provisions of the law cannot be given any credence and must be rejected.

If the land of these alleged beneficiaries was withdrawn and classified as mineral by drastic executive orders at the time of entry contrary to law and all the evidence, and the negative "not" is to be stricken from the law, the same reasoning would apply to petitioner and he would have a preference right under this same theory. Needless to say, the statute means the same thing in all instances. If it is to be given the application "prior to and at the time of entry", as urged by respondents and repeatedly stated in their conclusions of law, in order to establish a

basis for their equitable theory, and the negative "not" is left in the statute, then obviously they have not only excluded the petitioner, but all other beneficiaries from the preference grant. They have proved by this means that there is no preference class. Prior to the Act of July, 1914, many entries had been cancelled under the mineral land laws (not by an executive order). Many of these entrymen made new application upon the enactment of the Act of July, 1914. Some have received a preference right by reason of Section 2 thereof. Respondents' theory clearly would exclude them as oil was restricted prior to date of their new application (39 L. D. 145). There is no legal basis for urging that the statute means only "prior to", and not "at the time of entry". Even respondents' theory is not so elastic as to permit them to insist that the words "prior to" should be inserted and the clause "at the time of entry" omitted. It is elementary in the construction of statutes that the intent must be found in the words of the Act, that no words may be inserted, nor may other words be omitted in an attempt to give effect to some alleged secret intent not contained therein. Such construction is judicial legislation and is invalid.

We think the premises upon which respondents' theory is predicated is without support in law or fact. If assumed to be true as a basis for so-called equitable claims, however, it is in direct violation of what Congress provided. Clearly this theory must be rejected, as courts may not give effect to a theory which negatives the express terms of the statute.

X.

Construction of Statute.

The issues of this case are determined by the construction of a statute. In considering the terms of this statute, we are not at liberty to disregard the limitations and exceptions found therein by omitting some words and inserting others, as there is a conclusive presumption that Congress intended to make no other exceptions. Nor can we negative the terms of the statute by giving effect to an equitable theory urged by respondents and accepted by the trial court, that "the preference right was intended exclusively for those entrymen whose land (at the time of entry) was classified as mineral by drastic executive orders", and not for entrymen whose land was suspended for classification prior to date of application. This is at variance with Land Office practice and the terms of the law. The provisions of the law are to be applied in like manner throughout. The entryman must have been subject to the Act of July, 1914, with oil restricted as all preference rights are predicated upon its terms and the law under which entry was made.

The *literal* meaning of the statute is plain and free from ambiguity. The general clause "as mineral at the time of entry" modifies both antecedents, "withdrawn or classified." The negative "not" modifies both "withdrawn or classified." It is impossible to depart from this literal meaning, since "at the time of entry" is the very basis of respondents' equitable theory, and the action of which

they complain, in urging that it was some drastic executive order at the time of entry which classified the lands as mineral.

The trial court both on demurrer and in its opinion held, in effect, that the literal meaning must be applied, and that no ambiguity is involved [R. 251]. In practice a qualified withdrawal is necessary to defeat a preference right. The only qualification in the statute is, "as mineral at the time of entry". This literal meaning is applied by the Land Department as it holds that "where the land is classified or withdrawn as mineral," it is subject to cancellation [R. 147]. (*Cleveland Johnson,* 48 L. D. 18, reversed by *Stockley* case.) In practice the Land Department granted a preference right although there was an outstanding executive order for reclamation, power sites, or for classification (Instructions, 48 L. D. 164), as shown by exhibits (*Alvina L. Kamen,* 48 L. D. 628). The practice, however, has not always been uniform in this respect.

Not only in fact but in law, there is no legal basis for departing from this literal meaning, "Withdrawn as mineral land at the time of entry," is an expression as old as the land office. The practice was used as early as 1865. It was used in 1908 in reference to land in this same general region, when other land was "withdrawn as mineral land" by operation of the mineral land laws (not an executive order) after it had been classified as mineral, and at that time petitioner's land was excluded as it had been classified as agricultural. The official record shows that this is the only classification ever made. "Classified as mineral at time of entry" is a well known term in public land procedure as it is customary to classify land during

this time, and Congress is familiar with this practice. The legal principle involved is frequently stated:

> "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all."
>
> *Johnson v. So. Pac.* (1904), 196 U. S. 369, at 370;
>
> *United States v. Standard Brewery* (1920), 251 U. S. 10;
>
> *Porto Rica R. R. v. Mor* (1921), 253 U. S. 245;
>
> *Great West. R. R. v. Swindon* (1885), 9 App. cases 808;
>
> 59 *Corpus Juris* 986.

The only purpose or result of departing from this literal meaning and application would be to inject ambiguity.

> *Wabash R. R. v. United States*, 178 Fed. 5, at p. 11;
>
> *United States v. Mo. Pac. R. R.* (1927), 278 U. S. 269;
>
> *Iselin v. United States* (1925), 270 U. S. 245.

Ambiguity may not be created by departmental misconstruction, nor may any practice or theory be recognized when it is wholly lacking in uniformity and obviously negatives the explicit provisions of law.

There is no ambiguity in the terms used by Congress. The most that can be urged is that there is some uncertainty in the extent of the preference class since each case is *sui generis*. Respondents seek an inconsistent and narrow construction, inconsistent in that it does not apply

uniformly the terms of their own equitable theory. In effect, they urge that there was a secret purpose not found in the Act and that this secret purpose should be recognized by the Court in order to exclude petitioner, and to include others not within the meaning of the words used. In substance, this is to contend that a narrow meaning should be applied in order to exclude petitioner as a beneficiary, and that a broad, distorted meaning, which goes so far as to negative the words used, should be applied to admit other entrymen and patentees under respondents' equitable theory. Regardless of any secret purpose, courts can give effect only to what Congress provided.

If we accept respondents' contention that Section 20 is a relief measure, then, as a matter of law, it is to be liberally construed to accomplish its purpose and correct the mischief. "Liberally construed means to embrace all cases fairly within its scope, resolving all reasonable doubts in favor of the applicability of the statute to the particular case."

Black's Law Dictionary;

Glen Falls Cement Co. v. Van Wert, 228 N. Y. S. 289;

Estate of Patterson, 155 Cal. 626.

It has long been the policy of the federal courts to apply the above doctrine for the protection of the rights of homesteaders. There can be no doubt that Congress intended that it should be so applied in this instance.

Conclusion.

Petitioner has advanced the only equitable theory which is compatible with the provisions of law, as it is based upon the Act of July, 1914, restricting oil subject to which all beneficiaries must derive their rights. No valid objection has been offered to this theory. It insists that the same meaning be applied to the clause "as mineral at the time of entry" in relation to petitioner, as is applied by respondents to establish a basis for their equitable theory. It requires that the ordinary significance and effect of an executive order "for classification" be applied in all instances, and not a fantastic meaning "that it classifies and withdraws all land as mineral", which would eliminate the preference class completely. It will be conclusively presumed, as a matter of law, that there is a preference class.

There can be no question that the beneficiaries of Section 20 are only entrymen and patentees subject to the Act of July, 1914. There can be no question that many entrymen subject to that Act did submit evidence that established that their land was non-mineral under Section 2 of that Act, as the Regulations show that this was done. There can be no question that petitioner offered proof of the non-mineral character of his land at the time of entry. It cannot be questioned that the affidavits, the basis of his rights, and other evidence as disclosed by the official record of non-mineral character, was before the Secretary. It cannot be questioned that as a matter of law in the absence of a contest or protest this evidence was conclusive. It cannot be questioned, that the Secretary assumed all the responsibilies of his office and made the determination of non-mineral and that the land was actually of this character at the time of entry as the patent verifies.

If non-mineral at that time, it could not have been mineral as the terms are mutually exclusive. The patent cannot negative the facts set forth in the affidavits. The Secretary was required to make the finding of non-mineral character at the time of entry, under the terms of the law of February 19, 1909, as well as Section 2 of the Act of July, 1914. We must conclude that this duty was performed as the patent is not open to collateral attack.

Wherefore it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed with costs to petitioner.

Respectfully submitted,

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APPENDIX.

PAGE 371 OF OFFICIAL BULLETIN 623 PUBLISHED 1917 BY DEPARTMENT OF INTERIOR, AFFECTING LAND IN ISSUE.

INDEX.

"In the following index every order of withdrawal, classification or restoration affecting lands in a township is given under the date on which the order was approved."

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EXECUTIVE ORDER.

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN CERTAIN STATES.

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national-forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 481, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant,

unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

FRANKLIN D. ROOSEVELT.

10 a. m., E.S.T.
November 26, 1934.

STATUTES.

GENERAL LAND LAWS.

It is provided in the Preemption Act of 1841 and the Homestead Act, incorporating the same provision, of 1864:

"No lands on which are situated known salines or mines shall be liable to entry."

Preemption Act, Sept. 4, 1841 (5 Stats. at Large, 456).

"No mineral lands shall be liable to entry and settlement under the provisions of the Homestead laws."

Sec. 2302, *Revised Stats.;*
Compiled Statutes 1901, p. 1410;
(6 Fed. Stat. Ann. 321).

MINERAL LAND LAWS.

The Act of May 10, 1872, commonly referred to as the Placer Act, to all intents and purposes constitutes the present system under which the mineral laws are administered. It is therein provided:

"In all cases lands valuable for minerals shall be *reserved from sale*, except as otherwise expressly directed by law."

Sec. 2318, *Revised Statutes*, Title 30, Chap. 2, Sec. 21, U. S. C. A.

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States."

Sec. 2319 (U. S. Comp. St. 1901, p. 1424).

Act of Feb. 19, 1909.

Sec. 218, Title 43, U. S. C. A.

ENLARGED ENTRIES OF CERTAIN NONMINERAL, NONIRRIGABLE LANDS IN CERTAIN STATES. (a) Any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this section, in the States of Arizona, California, Colorado, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, three hundred and twenty acres, or less, of *nonmineral,* nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided,* That no lands shall be subject to entry under the provisions of this Act* until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. (35 Stat. 639.)

Sec. 220, Title 43, U. S. C. A.

APPLICATIONS FOR ENTRY OF LANDS NOT DESIGNATED AS SUBJECT TO ENTRY AND FOR ADDITIONAL ENTRY OF CONTIGUOUS LAND. Where any person qualified to make entry under the provisions of the second preceding section, shall make application to enter under the provisions of said sections any unappropriated public land in any State affected thereby which has not been designated as subject to entry under the section (provided said application is accompanied and supported by properly corroborated affidavit of the applicant in duplicate, showing prima facie that the land applied for is of the character contemplated by said section), such application, together with the regular fees and commissions, shall be received by the register of the land district in which said land is located, and suspended until it shall have been determined by the Secretary of the Interior whether *said land is actually of that character;* that during such suspension the land described in said application shall be segregated by the said register and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said section, then such application shall be allowed; otherwise it shall be rejected, subject to appeal. (Sec. 1, 38 Stat. 1162.) (Italics supplied.)

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*March 4, 1915.

PICKETT ACT.

Act of June 25th, 1910.

Section 141. Withdrawal and reservation of lands for Water-power sites or other purposes.

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

All lands withdrawn under the provisions of this and the preceding section shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: Provided, That the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: Provided further, That this and the preceding section shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June 25, 1910.

And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this and the preceding section all lands

which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That no national forest shall be created, nor shall any additions be made to one created, prior to August 24, 1912, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (June 25, 1910, c. 421, sec. 2, 36 Stat. 847; Aug. 24, 1912, c. 369, 37 Stat. 497.)

Leasing Act.

Feb. 25, 1920 (S. 2775).

An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That deposits of coal, phosphate, sodium, oil, oil shale, or gas and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this Act to citizens of the United States.

Sec. 20. In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under railroad grant, the entryman or patentee, or assigns, where

assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof.

[Section 21 relates to oil shale.]

Act of July 17, 1914.

An Act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to

prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal

of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided,* That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located *are in fact nonmineral in character.*

SEC. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same. (38 Stat. 509.)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. [redacted] 2

JEAN BOURDIEU,

Petitioner,

vs.

PACIFIC WESTERN OIL COMPANY (a corporation), KETTLEMAN OIL CORPORATION (a corporation), KETTLEMAN NORTH DOME ASSOCIATION (a corporation), FRANK KENNEDY and FRANKLIN R. KENNEY,

Respondents,

THOMAS M. CRUM and C. G. SMITH, et al.,

Defendants.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Defendants.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

(The opinion of the Circuit Court of Appeals is printed in the Record at pages 364-380, and is reported in 80 F. (2d) 774.)

Because of certain omissions and inaccuracies in the statement of the case and the facts given by petitioner in his petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Ninth Circuit and in his brief in support thereof, concerning matters considered important, respondents here set out a brief statement of the case.

Petitioner, Jean Bourdieu, made a homestead entry of the land here involved on March 6, 1919, under the non-mineral land laws (Act of February 19, 1909; 35 Stat. 639). (R. 291-297.) This entry was made expressly "subject to the provisions and reservations of the Act of July 17, 1914". (R. 291 and 294.) On October 7, 1925, a patent for the land was issued to petitioner, excepting and reserving, however, "to the United States all the oil and gas" in the lands so patented. (R. 300.)

The land involved, the North half (Lots 1, 2, the East half of the Northwest quarter and the Northeast quarter) of Section 30, Township 21 South, Range 17 East, M. D. M., was on December 30, 1910, "withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States", by President Taft's Order of Withdrawal of that date. (R. 286.) This Order has never been revoked in so far as it affects the land here involved. By virtue of the permissive effect of the Act of July 17, 1914 (38 Stat. at L. 509, U. S. C., title 30, secs. 121, 122, 123), entitled "An act to provide for the agricultural entry of lands withdrawn, classified or reported as containing phosphate, nitrate, potash, oil, gas, or as-

phaltic minerals",[1] this land so withdrawn was opened to agricultural or surface entry under the homestead laws, provided the applicant for such entry made his entry with a view to obtaining title with a reservation to the United States of the minerals on account of which the land had been "withdrawn or classified or reported as valuable". Obviously, if that Act had not been passed, the petitioner could not have made any entry at all on the lands here involved because of the effect of the Taft Withdrawal Order of December 30, 1910.

The respondents Kettleman Oil Corporation, Ltd., and Pacific Western Oil Company are lessees of the United States. The lease was issued October 4, 1929, under the Leasing Act of February 25, 1920 (c. 85, 41 Stat. at L. 437, U. S. C., title 30, secs. 131 et seq.), and it includes the right to recover the oil and gas under the lands here involved. The prospecting permit out of which the lease grew was issued to one Thomas M. Crum on May 28, 1921, and by various assignments came to be held by the present lessees. The petitioner filed his bill of complaint in the District Court for the Southern District of California, Northern Division, July 1, 1931. In brief, the bill is based on the theory that under Section 20[2] of the Leasing Act of February 25, 1920, petitioner was given a preference right to a prospecting permit; that he could be divested of that right only by service on

1. This statute is set out in the Appendix, pages i-iii.
2. The pertinent portion of this section is set out in full at page 15 of this brief.

him personally of a written notice of application by another for a prospecting permit, and that since there was no such written notice served on him personally, he is entitled, at this date, to assert his rights against respondent lessees and have the lease from the United States held by such lessees conveyed by them to him in so far as it covers the oil and gas under the lands embraced by his surface patent. The bill alleges no relationship, by contract or otherwise, between petitioner and respondents, or any of them. It does not allege that the petitioner ever made application to the Land Department for a prospecting permit or lease and the proof adduced at the trial shows that no such application was ever made by petitioner. The bill does not allege that any of the respondents fraudulently prevented or attempted to prevent petitioner from obtaining from the United States either a prospecting permit or an oil and gas lease covering the lands involved. As found by the trial court, the record shows that "No defendant ever fraudulently or otherwise prevented complainant herein from obtaining from the United States of America any prospecting permit or any oil and gas lease" on the premises involved, "nor did the complainant herein ever apply for or attempt in any manner to obtain from the United States of America an oil and gas prospecting permit or lease relating to the said lands." (R. 318.)

For the first time the petitioner claims that respondents were guilty of fraud, terming them in his brief in support of his petition for a writ of certi-

orari, a "subsequent fraudulent permittee and lessee of the United States" (petition, p. 5; petitioner's brief, p. 10) and claiming that "The permit to prospect was obtained by filing false affidavit as to the facts when the adverse application was made". (Petition, p. 6.) The truth is that petitioner's bill of complaint makes no allegation of fraud against the respondents. Furthermore, no claim of fraud was made during the trial, or at any other time, until the filing in this court of the petition for a writ of certiorari. Indeed, the District Court found as a part of its findings of fact that "The complainant herein makes no claim that any fraud was practiced or attempted to be practiced upon him by the defendants herein, or any of them, *in connection with any matter or thing pertaining to this suit,* nor does the complainant claim that there was at any time any fiduciary relationship existing between him and the defendants, or any of them". (R. 317.) And in the memorandum of decision of the trial court (R. 250-251), it is said:

> "There is no claim of any fraud. There is no contention that at any time any fiduciary relationship existed between complainant and any of the defendants named in the Bill. It is admitted that Bourdieu has not at any time attempted to obtain from the United States an oil and gas prospecting permit or an oil and gas lease relating to the lands that he claims in this suit, and the complainant does not assert that any of the defendants fraudulently prevented him from obtaining from the Government either a prospecting

permit or an oil and gas lease on the premises that are involved herein."

In view of the indisputable facts, it is, to say the least, surprising that petitioner should so frame his petition for a writ of certiorari and brief in support thereof as to give the clear impression that the bill charges fraud against the respondents.

Respondents filed motions to dismiss the bill in the District Court, stating, as one of the grounds of the motions, that the United States was a necessary party and claiming that the court must notice judicially the facts which show the interest of the United States. On October 20, 1932, the District Court denied the motions, not, as stated by petitioner, upon the authority of *Witbeck v. Hardeman*, 51 F. (2d) 450 (see page 4 of petition for writ of certiorari), but "Because of doubt existing as to how far this court may judicially know public and geographical matters on a motion to dismiss a bill in Equity without a hearing on the merits * * *". (R. 21.)

The District Court heard the case on the merits and held that "Section 30 in controversy here was actually not only wholly withdrawn and detached from the existing public domain by the Presidential edict of December 30, 1910, but * * * was also classified as oil land by such withdrawal order" (R. 255); that the land being both withdrawn and classified as oil land at the time of petitioner's homestead entry, and the entry having been made with a reservation of the mineral, "there is no preference right under the Leasing Act. This interpretation appears to have

been the one established by the regulations of the General Land Office as shown by Circular No. 672 in evidence" (R. 259); and, in addition, that "the admitted delay of about three years by Mr. Bourdieu after his knowledge of the existence of the defendants' oil lease covering his homestead, speaks forcefully against him in a court of equity. * * * His claim is stale and inequitable" (R. 259, 260); and that "The complainant has been and is guilty of gross laches in the assertion of his claim". (R. 330.)

On appeal, the Circuit Court of Appeals for the Ninth Circuit stated (R. 378) that the United States was not made a party to the suit, that it is conceded that the United States is the owner of the oil and gas deposits, that two of the respondents have a permissive right to remove those deposits by reason of being lessees of the Government, and held[3] that neither the Circuit Court of Appeals nor the District Court had jurisdiction and that, therefore, the motion to dismiss should have been sustained in the District Court. A petition by Bourdieu for a rehearing in the Circuit Court of Appeals for the Ninth Circuit was denied by that court. (R. 381.)

PETITIONER HAS STATED NO VALID REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI BY THIS COURT.

Petitioner has set forth several matters which he says are reasons for the granting of the writ of cer-

3. The opinion is printed in the Record at pages 364-380, and is reported in 80 F. (2d) 774.

tiorari by this court. It is believed that their invalidity will be apparent.

(1) The first reason given by petitioner is that the decision of the Circuit Court of Appeals in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Witbeck v. Hardeman,* 51 F. (2d) 450, affirmed by this court in *Hardeman v. Witbeck,* 286 U. S. 444.

Petitioner claims that the facts of the *Witbeck* case are, "from a *stare decisis* viewpoint", identical with the facts in the case at bar. It is submitted that the distinction between the *Witbeck* case and the one at bar is plain. In that case both parties had applied to the Land Department for a permit to prospect and the plaintiff therein claimed that the Secretary of the Interior had decided wrongly as between the two applicants. Indeed, the court states that in deciding the case it merely "succeeds to the Secretary in identifying that choice" (51 F. (2d) 453) (that is to say, the choice of the proper permittee as between two applicants where that choice is dictated unequivocally by law). The court states at page 453 of the report that the application of Witbeck (who was the prevailing party in the case) "was filed November 12, 1923, perfect in form and substance, and accompanied by required fees". Hardeman, who claimed the preference right to a permit, did not swear to his application and did not pay his fees within the thirty days during which a preference was by law granted to him, and for those reasons the Secretary denied his application. It is obvious that this is quite different

from a case of the court undertaking to make a decree where there has been no application in the Land Department by one of the contending parties, for, *non constat* but that the Secretary would have granted, or would now grant, the application of petitioner for a permit or lease. For a court to make a decree in the case at bar would interfere directly with the function of the Land Department, which, because of the failure of petitioner to make application, has never had the opportunity to pass upon his claim and has never had an opportunity to decide between applicants. In the *Witbeck* case the court was merely asked to correct an alleged erroneous decision of the Secretary of the Interior who had exercised his function in making that decision. (In point of fact, the court affirmed the action of the Secretary.) In the case at bar the court is asked to take over the duties of the Land Department before that Department has had any opportunity to perform its function of deciding between two claimants. Petitioner seeks to have the court do away with the necessity of application to the Land Department by petitioner and to deny all control, all jurisdiction, and all discretion to the Secretary of the Interior.

(2) The second "reason" advanced for the granting of a writ of certiorari is that the decision of the Circuit Court of Appeals herein is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Skeen v. Lynch*, 48 F. (2d) 1044. (Certiorari denied, 284 U. S. 633.) In that case the Circuit Court of Appeals for the Tenth Circuit did

not directly pass upon the question of its jurisdiction to consider the second count of the bill in the absence of the United States. The holding of the court on the second count is merely that "The court (referring to the District Court) did not err in dismissing the second count". (p. 1047.) It is true that the Circuit Court of Appeals discussed the question of whether plaintiff therein had a preference right to a permit to prospect, but it is also true that the subject of jurisdiction was not discussed specifically, and it does not necessarily follow from the fact that the court took cognizance of the controversy that it passed on the question of jurisdiction. As stated by Judge Haney in the opinion of the Circuit Court of Appeals in the case at bar:

> "Although in *Skeen v. Lynch* (C. C. A. 10), 48 F. (2d) 1044 (Certiorari denied 284 U. S. 633, 76 L. ed. 539, 52 Sup. Ct. 17), in the second cause of action relating to a preference right under the Leasing Act, the jurisdictional point was not raised, it was held with respect to that cause of the bill that the preference right given by the Leasing Act applied only to entries made without reservation of the mineral rights."[4]

(3) It is next stated by petitioner that the Circuit Court of Appeals for the Ninth Circuit has decided an important Federal question of law in a manner in conflict with the decision of this court in

4. It will be noted that the actual holding of the court in the *Skeen* case is directly in accord with the contention of respondents concerning the merits of the case at bar. The court there held that a preference right was given only to such entrymen as made entry upon the land without exception or reservation of the mineral deposits and in the expectation of receiving title by patent to the whole fee.

Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33. Petitioner, at page 18 of his brief in support of the petition for a writ of certiorari, purports to quote from the opinion of this court in the *Waterman* case. While the words given by petitioner may, upon search, be found in the opinion of the court, petitioner has apparently built up the quotation from several paragraphs of the opinion, without giving the context of the paragraphs from which the words are chosen. For example, one sentence which petitioner purports to quote at page 18 of his brief, there reads:

> "* * * If the court can do justice to the parties before it *without injuring* absent persons, it will do so."

The matter as it appears in the opinion, is (p. 49):

> "If the Court can do justice to the parties before it without injuring absent persons it will do so, *and shape its relief in such a manner as to preserve the rights of the persons not before the Court.* If necessary, the Court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons."

Obviously, the case is in no way in conflict with the decision in the one at bar. The *Waterman* case had nothing whatsoever to do with the question of a court's jurisdiction over public land of the United States while that jurisdiction is vested in the Land Department. The rule of the *Waterman* case could not be applied to the case at bar, for the interests of the United States in the case at bar are in effect iden-

tical with the interests of respondent lessees, the respondents claiming no interest other than as lessees of the United States, and so, of course, the court could not segregate and preserve separately the rights of the United States. Any decree for petitioner would necessarily affect the rights of the United States.

(4) Petitioner next claims that the decision of the Circuit Court of Appeals for the Ninth Circuit "denies the affirmation of specific jurisdiction conferred upon federal district courts by Section 31 of the Leasing Act". That section is quoted at page 21 of petitioner's brief, and a mere reading of the section will disclose its inapplicability. The United States District Courts are by that section given jurisdiction to *forfeit and cancel* a lease by an appropriate proceeding therein "whenever the lessee fails to comply with any of the provisions of said sections of the lease, or of the general regulations promulgated under said sections and in force at the date of the lease".[5] It should first be noted that petitioner in the case at bar has not asked that the lease be "forfeited and cancelled"; secondly, it seems obvious that the provisions contained in Section 31 of the Leasing Act of February 25, 1920, are for the benefit of the United States acting through its Secretary, or at the very most, for the benefit of someone who has a right to have a lease "forfeited or cancelled".

(5) Petitioner also asserts that the issue in this case presents an important question of Federal law which has not been directly decided by this court. It

5. This section is printed in the Appendix, page iv.

is submitted that the principle of law involved in this case, which was followed by the Circuit Court of Appeals for the Ninth Circuit in its opinion, is a principle well settled by the decisions of this court. This principle is established beyond question by the cases of

Louisiana v. Garfield, 211 U. S. 70;
Oregon v. Hitchcock, 202 U. S. 60;
Wilson v. Elk Coal Co., 7 F. (2d) 112.

In the cases above cited it was held that the courts had no jurisdiction in cases where the title was held or claimed by the United States.

(6) Although petitioner does not, in his petition for a writ, refer to the case of *Alaska Consolidated Oil Fields v. Rains,* 54 F. (2d) 868, he does claim in his brief in support of the petition that the decision of the Circuit Court of Appeals in the instant case is in conflict with that of the same circuit in the *Alaska* case. An examination of the facts of that case will show that there is a fundamental distinction between it and the case at bar, and that there is, in fact, no conflict in the decisions. In that case the action was brought to foreclose mechanics' liens for work done by the plaintiff in connection with the drilling of oil wells upon lands over which the defendant held a permit from the United States to prospect for oil and gas. It was held that the action would lie because the permit was an "interest in land" subject to mechanics' liens as prescribed by the laws of Alaska. The court said at page 868:

> "It is clear that the decree of foreclosure would not be binding in any way upon the United States, and that the only interest which could be sold

under the decree would be the interest of the appellants in and to the land in question. * * *"

In the *Alaska* case *all the decree purported to do was to place the plaintiff, who was seeking to enforce a mechanic's lien, in a position to ask that he be made the permittee,* and all that was decided was that the prospecting permit was a property right subject to mechanics' liens under the Alaska law. In the case at bar the petitioner has always had, and now has, the right to apply to the Land Department for a permit or a lease, but he has never seen fit to do so. In effect, *petitioner seeks to have the court decree that he is the lessee, and seeks a decree directing conveyance of the lease to him.* In the *Alaska* case there was a definite relationship, established by the law giving plaintiff his mechanic's lien, between the plaintiff and the defendant who held the permit. Only by enforcing that relationship could plaintiff be in a position to seek to be made the permittee, and all the court did was to enforce that relationship. In the case at bar there is no relationship of any kind between petitioner and respondents and nothing has been done by respondents to give petitioner a right to proceed against them. There is no contract between petitioner and respondents, or any of them, and no other relationship between them concerning the North half of Section 30.

While it is recognized that the merits of this case are not before this court on a petition for a writ of certiorari, in view of the fact that petitioner has quoted a portion of Section 20 of the Leasing Act of

February 25, 1920 (p. 11 of petitioner's brief), which section is controlling in the case at bar, and of the further fact that petitioner insists that "In determining the question of jurisdiction, the facts set up by the bill must be considered true". (p. 23 of petitioner's brief), it is felt that it will not be out of place to append hereto a brief discussion of Section 20 of the Act of February 25, 1920, and of the essentials of the case itself. This discussion will be found in the Appendix.[6] We point out here that petitioner, in quoting from Section 20 of the Leasing Act, omits the part thereof which is the key to the merits of this case. The pertinent portion of that section reads:

> "In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees, or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres for the purpose of making joint application. * * *"
>
> *U. S. Code, title 30, section 229* (cited by petitioner at p. 11 of his brief as Section 214).

The part underlined above is the part omitted by petitioner, and, as noted, contains the key to the whole controversy on the merits.

6. See Appendix, pages vi and viii.

CASES CITED BY THE CIRCUIT COURT OF APPEALS SUSTAIN ITS DECISION.

Petitioner asserts that the cases cited by the Circuit Court of Appeals for the Ninth Circuit to sustain its decision herein are not applicable. He argues that in the case at bar petitioner does not seek title, nor does he seek to have the court dispose of the land to the injury of the United States. Petitioner states that he "seeks merely to be given the contract to prospect as to his homestead, which the United States, speaking through the Congress, provided that he should have".

Thus petitioner seeks to distinguish the case at bar from the cases of

Wilson v. Elk Coal Co., 7 F. (2d) 112;
Proctor v. Painter, 15 F. (2d) 974; and
Skeen v. Lynch, 48 F. (2d) 1044. (In so far as the first count of the bill therein is concerned.)

It is only necessary to point out that in the *Wilson* case the plaintiff prayed that the appellee, who was only a lessee of the Government, be declared a trustee for him. Thus it is apparent that Wilson sought not the title to the coal, but to be substituted as a lessee, as petitioner does in the instant case. Yet the court held that the action would not lie.

The fact is that the prayer of the complaint in the case at bar shows that petitioner seeks far more than "merely to be given the contract to prospect as to his homestead". (See p. 23 of petitioner's brief.) He seeks, as shown by that prayer, a decree directing "That the defendant, Pacific Western Oil Company,

be directed to forthwith execute and deliver to this complainant a good and sufficient conveyance of said lease, in so far as it affects the premises hereinabove described,". (R. 13.) In the face of this prayer petitioner contends that the case is not one in which the United States has an interest. It is undisputed that the title to the oil and gas in the premises involved is in the United States. It is undisputed that the United States has given to respondents the right to remove said oil and gas. It is equally clear that the rights of the respondents depend entirely upon the right of the United States and that any decree affecting respondents' interest in the oil and gas must affect the interest of the United States, for, out of the interest of the United States, grows the interest of the respondents. In this connection the court is referred to the case of *South Penn Oil Co. v. Miller,* 175 Fed. 729, at page 736, holding lessors of oil property to be indispensable parties to a suit to determine the title to property leased from them.

Petitioner seeks to have the court award to him the right to remove the oil and gas under the North half of Section 30, Township 21 South, Range 17 East, M. D. M. The title to that oil and gas in place in the premises is in the United States. The rights of the respondents, the lessees, are wholly subordinate to and in privity with those of the United States. Thus, any decree which affects respondents must affect also the paramount title.

In order to show why the courts do not take jurisdiction of cases such as the one at bar, where title is held or claimed by the United States, it is only neces-

sary to note what would happen if petitioner's prayer should be granted. A decree for petitioner would result in the petitioner becoming the lessee of the United States of the oil and gas contained in 320 acres (the area over which petitioner claims that he had a preference right to a permit to prospect). It is obvious that this would affect the United States and that the making of such a decree would interfere directly with the functions of the Land Department and the Secretary of the Interior. To illustrate, suppose that petitioner had actually received a permit to prospect—he would have received a permit covering 320 acres, the area covered by his surface patent. Had petitioner made a discovery upon that supposed permit area, he would have been entitled, as a matter of right, to a lease covering only 160 acres. Concerning the other 160 acres within the supposed permit area, the granting or refusal of a lease would lie entirely within the discretion of the Secretary of the Interior. The Secretary might refuse to grant a lease for more than 160 acres and there could be no complaint by the permit holder. Further, even if the Secretary did grant the lease for the full 320 acres, the royalty basis on the additional 160 acres might be entirely different than it now is, and that, too, is by law to be determined by the Secretary of the Interior acting in his discretion. (See Section 14, Leasing Act of February 25, 1920.)[7] Will the court supersede the function of the Secretary in exercising that discretion which is vested in him by law and bring about a result whereby, with no opportunity afforded the Secre-

7. This section of the statute is printed in the Appendix, pages v and vi.

tary to make any decision or exercise any discretion, the petitioner would be given a lease over an area twice as large as he would be entitled to as a matter of right if he had in the first place had a prospecting permit? It is submitted that the court should not, and will not, by a decree interfere with the function of the Land Department in determining whether or not a lease would be granted to appellant.

CONCLUSION.

It is submitted that there is no conflict existing in the Circuit Court of Appeals concerning the question of jurisdiction in the case at bar; that there is no conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case and the decisions of this court, and that, on the contrary, the decision of the Circuit Court of Appeals in the instant case is in harmony with the decisions of this court concerning the questions of jurisdiction and the necessity of the presence of the United States as a party defendant; that there is no affirmation of specific jurisdiction of the District Courts conferred by Section 31 of the Leasing Act of February 25, 1920, which is applicable in any way to the case at bar, as claimed by petitioner; that the issue in this case does not present any question of Federal law which has not been well settled by the decisions of this court; and that the decision herein of the Circuit Court of Appeals for the Ninth Circuit is consonant with sound and established principles of law.

Respondents respectfully submit that this court should decline to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in this case.

Dated, San Francisco, California,
March 18, 1936.

Respectfully submitted,
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FELIX T. SMITH,
Solicitors for Respondents, Pacific Western Oil Company and Kettleman Oil Corporation.
GEORGE W. NILSSON,
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HERMAN PHLEGER,
Solicitor for Respondent, Frank Kennedy.
W. J. KENNEY,
Solicitor for Respondent, Franklin R. Kenney.

MORRISON, HOHFELD, FOERSTER,
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ORRICK, PALMER & DAHLQUIST,
BROBECK, PHLEGER & HARRISON,
Of Counsel.

(Appendix Follows.)

Appendix

ACT OF JULY 17, 1914, 38 STAT. 509, U. S. C. TITLE 30, SECS. 121, 122, 123.

An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas, or Asphaltic Minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the non-mineral land laws of the United States, whenever such location, selection, entry or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: **Provided,** That all applications to locate, select, enter, or purchase under this Section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

Sec. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the

locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: **Provided,** That nothing herein contained shall be held to deny or abridge the right to present and have prompt con-

sideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact non-mineral in character.

Sec. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the non-mineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

SECTION 31, LEASING ACT OF FEBRUARY 25, 1920.

"**Forfeiture or cancellation of leases.** Any lease issued under the provisions of sections 181 to 194, 201 to 208, 211 to 214, 221, 223 to 229, 241, 251, and 261 to 263 of this title may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of said sections, of the lease, or of the general regulations promulgated under said sections and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof." (Feb. 25, 1920, c. 85, §31; 41 Stat. 450; U. S. Code, title 30, sec. 188.)

SECTION 14, LEASING ACT OF FEBRUARY 25, 1920.

Upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit. The permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit. The area to be selected by the permittee, shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public-land surveys; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposits made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year, with the right of renewal as prescribed in section 226 of this title. The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, and under such other con-

ditions as are fixed for oil or gas leases in sections 181 to 194, 201 to 208, 211 to 214, 221, 223 to 229, 241, 251, and 261 to 263 of this title, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe. The Secretary shall have the right to reject any or all bids. (Feb. 25, 1920, c. 85, §14; 41 Stat. 442; U. S. Code, title 30, sec. 223.)

The soundness of the general rule that in determining the question of jurisdiction the facts alleged in the bill must be taken as true cannot be disputed, but it is equally well established that only *facts* alleged are so considered. Conclusions are not to be taken as true or correct, and, certainly, conclusions which are illuminated and shown to be erroneous by *facts* set up in the bill or facts of which the court may inform itself as matters of judicial knowledge, are not to be taken as correct. Even allegations of fact which are thus refuted are not to be taken as true.

See:

People v. Oakland Water Front Co., 118 Cal. 234.

So it is that petitioner's allegations that he had a preference right to prospect on the land involved, and that such preference right was a vested one which could be divested only by personal service of written notice of an adverse application for a permit, are not necessarily to be taken as true, even where the court is considering its jurisdiction. Certainly a court has a right to examine the true facts of a case in order to determine whether it has or will take jurisdiction. In the case at bar, the petitioner's rights depend upon the entry made by him (R. 291-296) and his patent (R. 299-301), and are controlled and limited by the effect of the Act of July 17, 1914 (Appendix p. i), subject to which the petitioner made his entry in 1919; Section 20 of the Leasing Act of February 25, 1920 (see page 15 of this brief); and the Taft Withdrawal Order of December 30, 1910 (R. 286-289), all of which are before this court as appearing in the bill or mat-

ters within the judicial knowledge of the court. An examination of these will show that petitioner never had a preference right to a permit to prospect, for he made his entry expressly *subject* to the provisions of the Act of July 17, 1914, and not in the expectation of receiving full fee title to the lands so entered. Petitioner made his entry upon lands which were "withdrawn or classified as mineral at the time of entry". He made no attempt to have the classification of the land changed as he might have done under the Act of July 17, 1914. For petitioner to claim a preference right now is to deny that he had a right to make any entry upon the lands involved at all, because the Act of July 17, 1914 permitted a surface entry only upon lands which had been "withdrawn or classified" as mineral or which were "valuable for" mineral. These lands were admittedly "withdrawn" by the Taft Withdrawal Order of December 30, 1910. If they were not "withdrawn or classified" as mineral or "valuable for" mineral, they did not come within the permission accorded by the Act of July 17, 1914, were still under the effect of the complete withdrawal from entry of the Taft Withdrawal Order of December 30, 1910, and petitioner's entry, therefore, had no effect because the lands were, if not within the permissive effect of the Act of July 17, 1914, not open to entry of any kind at all. If the lands *were* "withdrawn or classified" as mineral, then petitioner had the right to make his surface entry, but by the terms of Section 20 of the Leasing Act of February 25, 1920, he has no preference right to a permit. Thus, in order to claim a preference right to a permit to prospect, petitioner must deny the very title papers upon which he must base any claim.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 2

JEAN BOURDIEU,
Petitioner,

vs.

PACIFIC WESTERN OIL COMPANY (a corporation), KETTLEMAN OIL CORPORATION (a corporation), KETTLEMAN NORTH DOME ASSOCIATION (a corporation), FRANK KENNEDY and FRANKLIN R. KENNEY,
Respondents,

THOMAS M. CRUM and C. G. SMITH, et al.,
Defendants.

BRIEF FOR RESPONDENTS.*

STATEMENT OF THE CASE.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, to which court a writ of certiorari has been directed, is printed in the Record at pages 364-380, and is reported in 80 F. (2d) 774.

*The Court may disregard the Brief in Opposition to Petition for a Writ of Certiorari, heretofore filed, because this Brief is filed herein as a complete new Brief.

Because he presents the merits of the case in his Supplementary Brief (p. 28 et seq.), and because of various omissions in the statement of the case and the facts given by the petitioner in his petition and in his briefs, concerning matters considered important, respondents here set out a brief statement of the case.

By bill of complaint, filed in the District Court for the Southern District of California, Northern Division, July 1, 1931 (R. 5-18), the petitioner, claiming that Section 20 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, U.S.C. title 30, Sections 181 et seq., entitles him to "a preference right" thereto, seeks to impress a trust in his favor upon a portion of an oil and gas lease (R. 302-317) which was issued as of October 4, 1929 (R. 302), under the Leasing Act of February 25, 1920, by the United States to the respondents Kettleman Oil Corporation, Ltd., and Pacific Western Oil Company, the portion involved here being so much of the lease as covers the North Half (N½) of Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian, in California, which contains 322.89 acres (R. 5-18) situated in the North Dome of the Kettleman Hills. The facts out of which petitioner's asserted "preference right" is claimed to arise are as follows:

Prior to 1910 the land in Section 30 was classified as agricultural land, and was open to entry under the general land laws. (R. 267; Bulletin 623, in evidence, pp. 102-108.)

The Pickett Act, 36 Stat. 847, U.S.C. A. title 43, Sections 141, 142, 143, was passed by Congress on

June 25, 1910. The text of this Act is set out in its entirety in the Appendix to this brief at pages 1 and 2. The first section is pertinent here. It provides that

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

December 28, 1910, the Acting Director of the Geological Survey wrote the Secretary of the Interior that "Information received from the field indicates that the following lands (describing all of Section 30 in Township 21 South, Range 17 East, M. D. M., and other lands) are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action:". (R. 286.) Under date of December 29, 1910, the Director's letter of December 28, 1910, was by the Acting Secretary of the Interior "referred to the President with favorable recommendation". (R. 286.)

December 30, 1910, President Taft signed an order withdrawing the lands, including all of Section 30, Township 21 South, Range 17 East, described in the form of order which had been submitted to the Secretary of the Interior on December 28th by the Acting Director of the Geological Survey and which had been referred to the President with the favorable

recommendation of the Acting Secretary of the Interior. (R. 286-289.) The Order of Withdrawal so signed by the President will be found in the Record at pages 286-289. The order, the action of the Acting Director of the Survey and the action of the Acting Secretary are set forth in full in the Appendix at pages 3-6. The order is entitled "Order of Withdrawal—Petroleum Reserve No. 16—California No. 7" and, so far as pertinent here, reads as follows:

> "It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled 'An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases', approved June 25, 1910:
>
> * * * Mt. Diablo Meridian, California,
> T. 21, S. R. 17 E. * * *
> Section 30, all; * * *
>
> The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,981 acres.
>
> Wm. H. Taft, President.
>
> December 31, 1910.
>
> Referred to the Commissioner of the General Land Office for appropriate action.
>
> R. A. Ballinger, Secretary."

To the regular session of Congress (House Document No. 317, 62d Congress, 2d Session; R. 234-239)

following the date of the withdrawal order of December 30, 1910, the Secretary of the Interior, pursuant to the requirements of Section 3 of the Pickett Act, made a report of lands withdrawn from settlement under the Pickett Act in which he listed under the heading "Petroleum" the lands described in the withdrawal order of December 30, 1910.

July 17, 1914, Congress passed "An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas or Asphaltic Minerals". 38 Stat. 509, U.S.C.A. title 30, Sections 121, 122, 123. (Appendix pp. 6-9.) Stated in brief substance, section 1 qualifies for appropriation under the non-mineral land laws "lands withdrawn or classified as phosphate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits" if entry thereon be made "with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable". Section 2 provides for the issuance of a patent containing "a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable", and preserves unabridged the right to present applications to enter such lands "with a view of disproving such classification and securing a patent without reservation", and also the right to show before final entry that the lands "are in fact non-mineral in character". Section 3 provides that one who has in good faith entered or who shall enter,

under the non-mineral land laws, lands "which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals", may upon applying therefor and making proof under the applicable laws, receive a patent therefor with "a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, * * *."

March 6, 1919, the Petitioner herein filed in the United States Land Office at Visalia, California, a homestead entry in which he applied to enter under the Act of February 19, 1909 (35 Stat. 639) (For text of this Act see Appendix pp. 9-14), Lots 1, 2, East Half (E½) Northwest Quarter (NW¼); Northeast Quarter (NE¼) Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian, containing 322.89 acres. The application was stamped as follows: "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 598)." (R. 291-296.) Immediately above the signature of the entryman on the application (R. 294) appear the words "Subject to provisions and reservations and limitations of Act of July 17, 1914". Admittedly this application was read "very carefully" by the petitioner, and he remembered "that it was made 'subject to provisions and reservations and limitations of the Act of July 17, 1914' ". (R. 94, 95.)

February 25, 1920, Congress passed the Leasing Act of that date. Section 20 of that Act reads as follows:[1]

> "In the case of lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres, for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty and not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof."

May 28, 1921, the Secretary of the Interior, acting under the Leasing Act of February 25, 1920, 41 Stat. 437, issued to one Thomas M. Crum United States Oil and Gas Prospecting Permit Visalia No. 09551, now Sacramento No. 019438, covering 2556.58 acres, including all of Section 30, in Township 21 South, Range 17 East. (R. 216-219; 297.) At the time he made application for this permit Crum did

(1)Section 20 is one of the so-called relief sections of the Leasing Act of February 25, 1920. Its purpose and operation are explained in an appendix to the Regulations promulgated by the Secretary of the Interior under the Leasing Act, and published in General Land Office Circular 672 in October,

not serve personal notice thereof on petitioner, nor did he furnish evidence of the service of notice or evidence that petitioner was the owner of any of the land involved in the application. (R. 109.)

From the summer of 1919, when he built a house, facing east, about two hundred yards south of the north section line of Section 30, down to July 1, 1931, when he filed the instant suit, the petitioner lived on the North Half of that section. As early as 1925 he was admittedly told that he had a preference right to drill for oil under the North Half of Section 30. As early as 1928 he was admittedly told by a Mr. Kennedy that Crum had a prospecting permit, covering Section 30 and other lands, to drill for oil therein. During that time he admittedly knew that oil wells were being drilled on Sections 20 and 28, within the area of the Crum permit, and on Sections 29 and 34, Township 21 South, Range 17 East, near the Crum permit area, but by his own admissions he "was not interested in the minerals" under his land, and made no claim to any right therein. (R. 91, 96, 99-102.)[2]

1920. The pertinent portion of that explanation is printed in the appendix at pages 42-47. And see regulation 12 issued by Department of the Interior stating that in order to qualify for a preference right to a permit, "the *entry* must have been made without a reservation of the oil and gas", * * *. (Appendix pp. 14-18.)

(2)In this connection it is to be noted that the District Court decreed that petitioner "has been and is guilty of gross laches in the assertion of his claim". (R. 330.) In his memorandum of decision (R. 259-260), which is incorporated in the findings (R. 282), the District Judge said:

> "Inasmuch as it has been found that complainant is not entitled to any preferential right under the Leasing Act I deem any finding on the issue of laches to be unnecessary. Nevertheless it is considered proper to observe that the admitted delay of about three years by Mr. Bourdieu after his knowledge of the existence of the defendants' oil lease covering his homestead, speaks forcefully against him in a court of equity. According to the evidence he idly sat by and through silent acquiescence encouraged the defendants to develop their lease and prove his homestead to contain oil in valuable quantities and then at a late date after speculating upon defendants' expensive explorations

June 8, 1925, the Register of the Land Office at Visalia, California, delivered to the petitioner herein a Register's Final Certificate (R. 297-299) (Appendix pp. 25 and 26), upon the face of which there was stamped the following: "Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat. 509), as to oil and gas." (R. 299.) On October 7, 1925, a patent to the lands described in the petitioner's homestead entry, that is to say, the land, involved in this litigation, was issued to the petitioner herein. (R. 299-301.) In addition to the usual provisions this patent contained the following: "Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509)." (R. 300, 301.)

March 8, 1929, by divers mesne conveyances the oil and gas prospecting permit which had been issued to the said Thomas M. Crum in 1921, and the rights and privileges of the original permittee therein and thereunder, became vested in the Respondents Kettleman Oil Corporation, Ltd.[3] and Pacific Western Oil Company, in the proportion of an undivided one-half

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and activities, asks that the fruits of their labor and expenditures be transferred to him. His claim is stale and inequitable.

The case involves oil lands. Property rights in such areas should be asserted with celerity. A suitor cannot be allowed to remain passive, eager to appropriate the benefits of another's activity if success is achieved or to assume an attitude of laissez faire if the other efforts result in failure. * * *"

(3)Kettleman Oil Corporation, Ltd. was formerly Kettleman Oil Corporation and was sued herein by that name. In this brief no attempt has been made to use one name throughout.

interest thereof to each of the said named corporations. (R. 301, 302.) Thereafter the Secretary of the Interior, having determined that discovery had been made of oil and gas in the land covered by the said permit, on October 4, 1929, executed and issued to the Kettleman Oil Corporation, Ltd., and the Pacific Western Oil Company, under the provisions of the said Leasing Act of February 25, 1920, a lease of oil and gas lands, which lease included and now includes the lands in said Section 30, Township 21 South, Range 17 East, Mt. Diablo Meridian. The lease is set out in full in the Record at pages 302-317.

Although he entered the North Half of Section 30, Township 21 South, Range 17 East, under the Enlarged Homestead Act of February 19, 1909, after that section was withdrawn by the Presidential Order of Withdrawal of December 30, 1910, and during the period when that Order of Withdrawal was in full force, except for the permissive effect of the above mentioned Act of July 17, 1914, the petitioner herein complains that the Circuit Court of Appeals for the Ninth Circuit erroneously refused to decide whether or not he had the preference right claimed by him under Section 20 of the Leasing Act of February 25, 1920, and claims that Section 20 of the Leasing Act gave him a preference right to a prospecting permit on the above described lands and to a lease in case of discovery, in consequence of which the respondents herein are his trustees to the extent of so much of their oil and gas lease as covers the North Half of said Section 30.

SUMMARY OF ARGUMENT.

Point One: The decision of the Circuit Court of Appeals should be affirmed because the United States is an indispensably necessary party to the suit.

Point Two: Petitioner never had a preference right because the lands in question were withdrawn and classified as mineral at the time of entry.

1. (a) The withdrawal order of December 30, 1910, shows on its face that it withdrew the lands as mineral, that is to say as petroleum lands.

(b) The history of the times demonstrates that the withdrawal order had as its object the withdrawal as mineral of the lands in suit.

(c) The Executive Department, through the Secretary of the Interior, interpreted the withdrawal as a mineral, that is to say petroleum, withdrawal.

(d) The Geological Survey characterized the withdrawal as a petroleum withdrawal.

2. The lands involved in this suit having been withdrawn lands at the time of petitioner's entry, if they were not withdrawn as petroleum lands petitioner had no right to enter them under the non-mineral land laws. If they were withdrawn as petroleum lands he has no preference right under Section 20 of the Leasing Act.

3. The lands in suit here were not only withdrawn as mineral lands; they were classified as mineral, that is to say as petroleum lands, at the time of petitioner's entry.

4. In Section 20 of the Leasing Act Congress must have referred to the type of withdrawals of which the withdrawal involved here is an example, because the form of withdrawal here is the form of oil land withdrawal used by the Executive Department after the enactment of the Pickett Act.

Point Three: The amended bill of complaint fails to state a cause of action because it does not show that the petitioner was himself entitled to either a permit or a lease from the United States and that it was refused to him because of an erroneous ruling by the Secretary of the Interior.

Point Four: The petitioner has been guilty of laches in the assertion of his claim.

POINT ONE.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DISMISSING THE SUIT SHOULD BE SUSTAINED.

Reversal by this court of the decision of the Circuit Court of Appeals will permit either that court or this court to consider and decide the merits of the case without the presence of the United States as a party. If this court should reverse the decision, it is earnestly hoped that the case will be retained here and its merits considered and determined.

The Circuit Court of Appeals decided that the suit and complaint must be dismissed, saying:

> "The United States was not made a party to this suit, and it is conceded that the United States

is the owner of the oil and gas deposits. It is shown that two of the appellees are lessees of the government, and by reason thereof have a permissive right to remove the oil and gas deposits. It is apparent therefore that neither the court below nor this court has jurisdiction of the subject matter of the suit, and therefore the motion to dismiss made by appellees in the court below should have been sustained."

The motion to dismiss (R. 357, 358) filed in the trial court by respondents Pacific Western Oil Company and Kettleman Oil Corporation, urged, as its second ground, that,

"There is a defect of parties to the said suit in that the United States of America is not either a party plaintiff or a party defendant although the bill of complaint shows on its face that the United States of America is an indispensable party to a complete determination of the suit and action."

In support of its decision the Circuit Court cited (R. 378, 379):

Bockfinger v. Foster, 190 U. S. 116, 126;
Wilcox v. Jackson, 13 Pet. 498;
United States v. Schurz, 102 U. S. 402;
Wilson v. Elk Coal Co., 7 F. (2d) 112, 113 (cert. den. 269 U. S. 587);
Proctor v. Painter, 15 F. (2d) 974.

It is the position of the respondents here that even if the Circuit Court of Appeals and the trial court had jurisdiction of the subject matter of this litigation, the decision of the Circuit Court of Appeals should be sus-

tained because the United States is an indispensably necessary party, and a decree to the effect that petitioner is entitled to a portion of the lease which was issued by the Secretary of the Interior to the respondents Kettleman Oil Corporation and Pacific Western Oil Company would directly interfere with the discretion already exercised by the Secretary of the Interior under the Leasing Act of February 25, 1920.

This court has decided that indispensable parties are those who have such an interest in the subject matter of the controversy that a final decree cannot be made without affecting those interests.

Shields v. Barrow, 17 How. 130, 139 (1854);
Christian v. Atlantic & N. C. R. R., 133 U. S. 233, 241 (1890);
Niles-Bement-Pond Co. v. Iron Molder's Union, 254 U. S. 77, 80 (1920);
Commonwealth Trust Co. v. Smith, 266 U. S. 152, 159 (1924).

It is conceded that the United States is the owner of the oil and gas underlying the lands in suit here, that respondents Kettleman Oil Corporation and Pacific Western Oil Co. are the lessees of the United States, and that by reason thereof they have a permissive right to remove the oil and gas. Thus lessees' claim under and their rights depend upon the right of the United States as lessor. The interest of the United States further appears from the fact that Congress has invested the Secretary of the Interior with discretion respecting the disposal of the oil and gas in question. Petitioner erroneously assumes in his brief that

Section 20 of the Leasing Act confers a preference right which in no way involves the exercise of the Secretary's discretion. (Petitioner's Supplemental Brief, p. 20.) The basis for this is the language "shall be entitled to a preference right to a permit" found in Section 20. It may be conceded that those words imposed upon the Secretary the absolute duty to award a privilege of first refusal to entrymen who are entitled to the benefits of Section 20.

The preference right granted by Section 20 of the Leasing Act is not, however, an absolute right in the sense claimed by petitioner. The Secretary must, in the first instance determine whether he should open the public domain, or any particular part of it, to prospecting at all. He may, in his discretion, grant or deny in part or in whole any application for a permit, as the facts may be deemed to warrant. It has been determined by this court that such was his discretion at the time the permit and lease in question here were issued.

> *United States v. Wilbur*, 283 U. S. 414, 419 (1931).

In the *Wilbur* case, supra, it appears that the Secretary of the Interior had issued a general order either rejecting or refusing to receive applications to prospect for oil or gas on the public domain. He claimed this "was done in pursuance of the authority vested in him by law". The court said that,

> "Having examined the Act (the Leasing Act of 1920) we cannot say that by any clear and indisputable language it refutes his position. Certainly

there is ground for a plausible, if not conclusive, argument that so far as it relates to the leasing of oil land it goes no farther than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare." (p. 419.)

From this decision it would seem to follow that in 1929, when the lease involved in the instant suit was issued to the respondents Kettleman Oil Corporation and Pacific Western Oil Company, the Secretary of the Interior had the power, "exercising a reasonable discretion", to refuse to grant oil and gas leases upon any unit of the public lands if he thought such refusal "would promote the public welfare". The petitioner herein, according to his claim, had a preference right to a lease covering the North Half of Section 30, containing 322.89 acres, and no more. He makes no contention that he was entitled to a lease covering any larger area. The area actually leased to the respondents in 1929 contained 562.89 acres. (R. 303.) Upon the analogy of the *Wilbur* case, supra, the Secretary had the power, "exercising a reasonable discretion", to decide whether or not it would promote the public welfare to include 562.89 acres in one lease or only 322.89 acres. Within the authority of that case, if petitioner had applied for a lease covering 322.89 acres, and no more, the Secretary was empowered to refuse to grant the application. If anyone else had applied for a lease covering these lands, or these and other lands, the Secretary could have refused. It may be conceded, arguendo, that if the Secretary decided to

lease the land to anyone at all in that unit of 322.89 acres, the petitioner, by virtue of his claimed preference right, was entitled to the first refusal of a lease or leases covering that area.

The real importance to the Secretary of the Interior of the power to determine in what units the oil resources in the public domain should be developed, is, we believe, demonstrated by the power expressly granted to the Secretary, in Section 30 of the Leasing Act, to permit a lessee to relinquish rights under a lease and to surrender any legal subdivision of the area within the lease. The portion of Section 30 which expressly gives the Secretary this discretion reads as follows:

> "The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all further obligation under said lease, and may with written consent surrender any legal subdivision of the area included within the lease."

How has the Secretary exercised his discretionary power upon the question of whether or not he would have leased 322.89 acres of this land to petitioner, had petitioner applied therefor? There is no evidence upon which this question can be answered. The only evidence is that the Secretary actually exercised his discretion by leasing a parcel containing 562.89 acres. It is submitted that a court should not now say, without hearing from the Secretary of the Interior, what the

Secretary would have done in 1929 if the petitioner had applied to him. A decree of a court entered in the absence of the Secretary, would decide what the Secretary would have done had an application been presented to him by petitioner.

Section 30 of the Leasing Act of February 25, 1920, provides, in part,

> "That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior."

This language clearly reserves in the Secretary power to say, in the exercise of a reasonable discretion, when, under what circumstances, and to whom a lease issued under the authority of the Act may be assigned. If a court should decide, in the absence of the Secretary, that the lessees in this suit hold their lease as trustees for the petitioner, the decision can go no farther than the interest and claim asserted, which is a right to a lease covering 322.89 acres—not 562.89 acres. What will be the effect upon the interests of the United States, the owner of the oil and gas, of a decree commanding the assignment of only so much of the lease as covers the 322.89 acres embraced within the petitioner's patented homestead? It is submitted that that question cannot be answered unless the Secretary of the Interior is made a party to the litigation. Surely if the court can make in this case, in the absence of the Secretary of the Interior, a decree assigning to the petitioner some portion of or all the leasehold interest involved herein, the discretionary power of the Secretary to say whether or not a lease

issued under the Leasing Act of 1920 shall be assigned; is taken away from the Secretary although it is expressly vested in him by Section 30 of the Leasing Act. Moreover, such a decree would in effect decide how the Secretary had exercised this discretionary power before he has been afforded an opportunity to say what he would do under "his general powers over the public lands as guardian of the people", and under the express authority with which he is invested by the Leasing Act.

The cases which petitioner cites as being in conflict with the decision in the case at bar are readily distinguishable from this case.

Witbeck v. Hardeman, 51 F. (2d) 450 (affirmed 286 U. S. 444), is not authority to the point that in the case at bar the Secretary of the Interior, is not a necessary party. There the Secretary had fully exercised his discretionary power to place under a permit the particular unit in controversy and, in addition, he had made a decision between two applicants for a prospecting permit. The Circuit Court of Appeals for the Fifth Circuit seems to have recognized this when it stated (51 F. (2d) p. 453), "No other or different disposition is now proposed to be made, and no term of the contract is to be altered. A change of permittees is alone to be effected." In the case at bar it is proposed, at the very least, to alter a term of the contract by impressing a trust upon only a portion of the lease which the Secretary of the Interior granted to Kettleman Oil Corporation and Pacific Western Oil Company, and this without any indication or suggestion of

what the Secretary himself would have done in that regard if he had been called upon to act by both parties, as he was in the *Witbeck* case.

Skeen v. Lynch, 48 F. (2d) 1044, is not contrary to the position of the respondents here. The bill of complaint in that case contained two counts, the first seeking to quiet title to coal lands against a lessee thereof from the United States, and the second, seeking, in the alternative, to impress a trust upon the lease. The first count was dismissed on the ground that the United States was an indispensable party. This seems to have been obviously correct because the coal was owned by the Government and the plaintiff in the suit was seeking to quiet title to it without making the Government a party. The second count was decided against the plaintiff on the merits, the court holding that inasmuch as the plaintiff had entered the lands four years after the Leasing Act of 1920 was enacted, he could not possibly have had a preference right under Section 20 of that Act. This also was obviously correct because an entryman could not have a preference right under Section 20 unless he made his entry before the effective date of the Act which gave him the right. The point concerning necessary parties was not considered by the court in connection with the second count. Moreover, the case is distinguishable on the same grounds as the *Witbeck* case: the plaintiff in the *Skeen* case did not seek in his second count to alter any term of the contract.

Waterman v. The Canal-Louisiana Bank & Trust Company, Executor, 215 U. S. 33, is not in point on

any phase of the case at bar. The point of the case may be seen in a quotation taken from page 49 of the report, as follows:

> "If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook,* 7 Wall. 425."

Alaska Consolidated Oil Fields v. Rains, 54 F. (2d) 868, from the Circuit Court of Appeals for the Ninth Circuit, is also distinguishable from the case at bar. In that case suit was brought to foreclose mechanics' liens for work done by the plaintiff in connection with the drilling of oil wells upon lands over which the defendant held a permit from the United States to prospect for oil and gas. It was held that the action would lie because the permit was an "interest in land" subject to mechanics' liens as prescribed by the laws of the Territory of Alaska. All the decree purported to do was to place the plaintiff, who was seeking to foreclose his lien, in a position to ask the Secretary of the Interior that he be made the permittee. The case did not in any way involve the question of what discretion the Secretary of the Interior had exercised in connection with the permit, whereas the case at bar involves that very question and, as well, the question of what discretion the Secretary of the Interior exercised in connection with the lease in suit here. Further, in the *Alaska* case, claims of the plaintiff were not

based in any way upon any rights derived or even claimed to have been derived from the United States, whereas in the case at bar the only right claimed by the plaintiff is a right which must arise under the land laws of the United States and from their administration by the Secretary of the Interior.

POINT TWO.

PETITIONER HEREIN NEVER HAD A PREFERENCE RIGHT TO A PERMIT OR TO A LEASE BECAUSE THE LANDS IN QUESTION WERE BOTH WITHDRAWN AND CLASSIFIED AS MINERAL, AT THE TIME OF PETITIONER'S ENTRY.

The term "mineral" as it is used in the Act of Congress relating to the public lands includes petroleum or mineral oil. (*Burke v. S. P. R. R. Co.*, 234 U. S. 669, 677-679.) The preference right claimed by petitioner could not have existed if the lands involved were, at the time of entry, "withdrawn or classified as mineral". Section 20 of the Leasing Act so states. (Supra p. 7.)

1. That the order of December 30, 1910 withdrew and classified the lands in suit as mineral, that is to say as petroleum lands, is demonstrated by the following considerations:

(a) It is clear from the face of the order (Appendix pp. 4-6) that it withdrew the lands as petroleum lands. It is entitled "Order of Withdrawal. Petroleum Reserve No. 16—California No. 7", thereby stamping the lands as petroleum lands. (*Cleveland Johnson,* on rehearing, 48 L. D. 18, 27; *Washburn v. Lane,* 258 Fed. 524, 525.) It expressly reserves them

"in aid of legislation affecting the use and disposal of *petroleum* lands belonging to the United States"; and it declares that "The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres". Thus it characterizes itself as one of a series of "petroleum withdrawals".

(b) The history of the times (*United States v. Union Pacific R. Co.*, 91 U. S. 72), prior to and at the date of the Order of December 30, 1910, discloses the reason for the promulgation of this and other similar orders of withdrawal. February 24, 1908, the Director of the United States Geological Survey wrote to the Secretary of the Interior urging that the filing of oil claims in California should be immediately suspended in order to insure an adequate supply of fuel oil for the Navy, and stated, in part, that "there are only a few areas of probable oil territory now remaining under governmental control, and these are rapidly being filed on and patented, either through legitimate oil development or by subterfuge over claims for gypsum, etc. If anything is to be done regarding the matter, there is no question but that it should be done at once, for prospecting is now going on at an unprecedented rate throughout the West". (Appendix pp. 37-39.) The Director renewed this recommendation on September 17, 1909 by transmitting to the incumbent Secretary of the Interior a copy of the above mentioned letter of February 24, 1908, and by writing that in the Geological Survey's Conservation report "it is shown that the present production of petroleum exceeds the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands

at nominal prices simply encourages overproduction, the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource". (Appendix pp. 39-41.) The recommendation of the Director was approved by the Secretary of the Interior, who brought the matter to the attention of President Taft. September 27, 1909, the President issued "Temporary Petroleum Withdrawal No. 5", temporarily withdrawing all public lands within an area aggregating 3,041,000 acres in California and Wyoming, "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain". (R. 183, 184), (Appendix pp. 41 and 42.) *United States v. Midwest Oil Company,* 236 U. S. 459, 467.) The Pickett Act of June 25, 1910, 36 Stat. 847, was then enacted to set at rest any doubt about the power of the Chief Executive to make withdrawals of public lands in a proper case. (Appendix pp. 1 and 2.) Finally, the "proposed legislation" in aid of which the President had made the withdrawals of September 27, 1910, December 30, 1910 and other petroleum withdrawals, was enacted by Congress. That legislation is the Leasing Act of February 25, 1920, 41 Stat. 437.

Against the background of this history, it can hardly be successfully contended that the Withdrawal of December 30, 1910, did not have as its object the withdrawal "as mineral" of the lands involved in this suit, nor that it did not in fact place them, as petroleum lands, within the out boundaries of "Petroleum Reserve No. 16—California No. 7".

(c) December 8, 1911, the Secretary of the Interior characterized the withdrawal of December 30, 1910 as a petroleum withdrawal by placing it under the heading of "Petroleum", in a report made by him to Congress in compliance with the requirements of the 3rd section of the Pickett Act. (R. 234-239.)

(d) On a map forming a part of United States Geological Survey Bulletin 623, and purporting to represent all California oil lands included in outstanding withdrawals as of September 30, 1916, the Geological Survey includes the lands involved in this suit in that category. (R. II, 7; and back of Appendix.)

2. The lands involved in this suit having been withdrawn lands at the time of petitioner's entry, if they were not withdrawn as petroleum lands petitioner had no right to enter them under the non-mineral land laws. If they were withdrawn as petroleum lands he has no preference right under Section 20 of the Leasing Act. A withdrawal of public lands for any public purpose severs them from the public domain and keeps them severed until the order is revoked by the President or by act of Congress. Section 1 of the Pickett Act so states in effect (Appendix pp. 1 and 2); and the courts have so held.

Kansas Pac. Ry. Co. v. A. T. & S. F. R. Co., 13 Fed. 106, 107;

Wilcox v. Jackson, 13 Pet. 498, 513;

United States v. Midwest Oil Company, 236 U. S. 459.

It is indisputable that the lands here in suit were withdrawn for some public purpose, whether as mineral or for classification is immaterial for the moment.

No entry under the non-mineral land laws, no location under the mineral land laws, could be validly made upon them, and no interest in them could be acquired under any land laws of the United States so long as they remained withdrawn. How did it happen then, and by virtue of what authority, that petitioner made agricultural entry on the north half of Section 30 at a time when the lands were actually and indisputably withdrawn? The answer to this question appears in the Act of July 17, 1914, 38 Stat. 509 (Appendix pp. 6-9), which was enacted in recognition of the fact that although known to be valuable for minerals or actually classified by the Geological Survey as being valuable for minerals, including petroleum, lands were not invariably valueless for agricultural purposes: both mineral and agricultural values could co-exist.

In express terms the Order of Withdrawal prohibited "settlement, location, sale or entry" of the lands, whether the effect of the order was to withdraw them as mineral or merely for classification. When petitioner sought to make his homestead entry he was faced with the necessity of finding some method of avoiding the absolute prohibition against entry which is contained in the withdrawal order that segregated Section 30 from the public domain. His entry papers (Appendix pp. 19-24) prove that he relied upon and made his non-mineral entry "in accordance with and subject to the provisions and reservations of" the Act of July 17, 1914. But the first section of that Act, which is the section applicable in this case, qualified for non-mineral entry only three classes of land, viz.: (1) lands withdrawn as "* * * oil * * *" lands, (2) lands "classified as * * * oil * * *" lands, and

(3) lands which are "valuable for those deposits", and then only if the lands so qualified for non-mineral entry were "otherwise available" for entry. If the Withdrawal Order of December 30, 1910 was not a withdrawal as mineral, it was a withdrawal of some other kind, inasmuch as it is admitted that it was a withdrawal. The Act of July 17, 1914, purports only to affect a withdrawal order if that order is a withdrawal "as phosphate, nitrate, potash, oil, gas or asphaltic minerals". Stated in another aspect, by the first section of that Act Congress removed from the Order of Withdrawal of December 30, 1910 the prohibition against entry *if* that withdrawal was a withdrawal of the lands as oil lands, and permitted a limited type of non-mineral entry if the lands were "otherwise available". The Act of July 17, 1914, can be given no other meaning or effect in the circumstances of this case.

Although he made his agricultural entry solely by permission of the first section of the Act of July 17, 1914, and although that permission was granted by Congress only if the withdrawn lands were withdrawn as oil lands, and although Section 20 of the Leasing Act does *not* give a preference right if the lands were "withdrawn or classified as mineral", the petitioner is contending that said Section 20 gives him a preference right to a permit and to a lease in case of discovery. The petitioner is attempting to repudiate the foundation upon which his entry and title rest. His claim destroys itself.

See *Empire Gas & Fuel Co. et al. v. State* (Tex.), 21 S. W. (2d) 376, especially page 378.

In his presentation of this phase of his case, petitioner confuses the provisions of Section 1 of the Act of July 17, 1914, with the provisions of Section 3 of that Act, by failing to recognize that the first section relates to and qualifies for non-mineral entry lands which were withdrawn or classified as oil lands, or were valuable for those deposits, at the time of entry, and that the third section relates only to lands which are "withdrawn, classified, or reported as being valuable for * * * oil, * * *", *"subsequently"* to non-mineral entry thereon. These sections of the Act of July 17, 1914 are clear and unambiguous and no further comment upon them is deemed necessary. It is to be noted, however, that petitioner's confusion of the provisions of the first with the provisions of the third section is shown by his reference to and comment upon Exhibits Nos. 6-14 and Nos. 15-27 (R. 137, 142-158), at pages 58 and 59 of his Supplementary Brief. We have inserted a discussion of these exhibits in the (Appendix, pages 28-36). Suffice it to say here that petitioner's Exhibit No. 6 presents an instance of an entrywoman who entered lands bona fide as agricultural, which were withdrawn or classified as mineral *after* the date of entry and before the date when she completed her final proof, and that plaintiff's Exhibit No. 15 presents an instance of an entryman who entered upon lands bona fide as agricultural which were *subsequently* reported as being valuable for oil and gas. Petitioner's Exhibits Nos. 6-14 and 15-27 (Nos. 6 and 15 being stipulated in the record to be typical) are all governed and controlled by the provisions of Section 3 of the Act of July 17, 1914 and not by Section 1 of that Act.

3. The lands in suit here were not only withdrawn as mineral lands; they were classified "as mineral", that is to say as petroleum lands, at the time of petitioner's entry.

(a) In *West v. Rutledge Timber Co.*, 244 U. S. 90 at page 98, this court said: "Classification is characterization through the selection of some quality or feature, and therefore lands may be classified as pasturage, grazing, timber, arable or mineral"; and held that the report of a deputy surveyor that "* * * the lands, if cleared, would be suitable for grazing, but at the time of the report were more valuable for their timber * * *", was a sufficient classification of the lands as non-mineral. This indicates that this court does not attribute any magic to classification nor to be of the opinion that classification of the public lands is something that must be accomplished in accordance with some or any imagined statutory rule or even by any official or employee of the government. The purely temporary character of practically any classification of lands and especially of oil lands, is expressly recognized by Dr. George Otis Smith, Director of the Geological Survey, in a letter of June 17, 1908 (R. 161, 162), in which he said (R. 162): "In dealing with oil lands it must be borne in mind, however, that absolute determination, by work on the surface of the occurrence or non-occurrence of oil in any locality is not possible. The best that can be done is to calculate the degree of probability on the basis of surface indications and structural conditions." It would seem that a classification of lands, especially of petroleum lands, even

when made by the Geological Survey, is usually the result of inference drawn from purely surface indications and is, in the average instance, a mere expression of opinion or possibility.

The Order of Withdrawal of December 30, 1910, shows on its face that the Director of the Geological Survey said that "Information received from the field indicates the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action". The recommendation was approved by the Acting Secretary of the Interior and the order was thereupon signed by President Taft. It is submitted, upon the analogy of *West v. Rutledge Timber Co. et al.*, supra, that the lands in suit here were classified as petroleum by the written statement of the Acting Director of the Geological Survey, by the approval of the Acting Secretary of the Interior, and by the President in signing the order of withdrawal.

(b) Moreover, the lands in suit here were, in fact, classified as petroleum lands on December 27, 1910, at a meeting of the Oil Section of the Land Classification Board of the United States Geological Survey. (R. 197, 208.) Dr. Max Ball, who was Director of the Oil Section of that Board testified in this suit, and his testimony is undisputed, that the lands embraced within the Order of December 30, 1910, were actually classified as petroleum lands as a result of an examination and consideration of new evidence which had been brought in to the Board from the field by Mr. Anderson, a member of that Board. This testimony was given after proof had been made that the

records of the December 27, 1910 meeting of the Board had disappeared and could not be found. (R. 193-196.) He further testified that he himself had drafted the minutes of the meeting and a letter for the signature of the Acting Director of the Survey, transforming the action of the Oil Section of the Land Classification Board into a report to the Secretary of the Interior, accompanied by a form of Order of Withdrawal creating Petroleum Reserve No. 16—California No. 7. (R. 339.)

4. If the withdrawal of December 30, 1910 did not withdraw Section 30 "as mineral", no order of withdrawal issued after June 25, 1910, when the Pickett Act was passed, could have had the effect of withdrawing oil lands because all such orders of withdrawal were in the same, or practically the same, form as the order of December 30, 1910. They read that there is "hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, * * *", or contained language practically identical with the language just quoted.[4] It is to be assumed, therefore, that when it enacted Section 20 of the Leasing Act in 1920, and created a preference right in the case of "lands not withdrawn or classified as mineral at the time of entry", Congress was not doing an idle thing but was directing the terms of that Act to forms of withdrawal

(4)See U. S. Geological Survey Bulletin 623, Petroleum Withdrawals and Restorations affecting the Public Domain, Government Printing Office 1916, pp. 182-369, for forms of orders of withdrawal during the period beginning July 1, 1910 and ending January 11, 1916.

orders which were then customary and in accordance with the executive and administrative practice.[5]

POINT THREE.

THE AMENDED BILL OF COMPLAINT FAILS TO STATE A CAUSE OF ACTION BECAUSE IT DOES NOT SHOW THAT THE PETITIONER WAS HIMSELF ENTITLED TO EITHER A PROSPECTING PERMIT OR A LEASE FROM THE UNITED STATES AND THAT IT WAS REFUSED TO HIM BECAUSE OF AN ERRONEOUS RULING OF LAW BY THE SECRETARY OF THE INTERIOR.

There is nothing in the amended bill of complaint to indicate that there was any fiduciary relationship, or any relationship of any kind, between the petitioner and any of the respondents. Nor is there anything in it which charges that any of the respondents deprived the petitioner of his claimed preference right by fraudulent means. It is wholly devoid of anything in the nature of an allegation that the petitioner made application to the Department of the Interior, or the Secretary, for either a prospecting permit or for an

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(5)The history of the development of the form of order of withdrawal embodied in the Order of December 30, 1910, was given by E. C. Finney, former First Assistant Secretary of the Interior, who testified at the trial of this suit. He said: "After the enactment by Congress of the Pickett Act of June 25, 1910, this form of order was drawn up. After the act of Congress was approved it was determined by the Department that a form of withdrawal order should be prepared in a lawyer-like and legal manner, to follow as far as appropriate the language of the statute itself, that is the Pickett Act of June 25, 1910. We considered it advisable to have a general form rather than to have different wording in each order. We cooperated in drawing up a general form in effect and substance like this one which was used very generally in making departmental withdrawals under the Pickett Act. By Departmental withdrawals, I mean Executive withdrawals. The language 'Reserved for classification' was taken from the language of the Pickett Act of June 25, 1910. The words 'Classification of lands' are used in the statute. Also the words 'withdrawn from settlement, sale or entry' are used in the statute. Our effort was to get as nearly a uniform form as possible and go along with the language of the statute and at the same time to state the purpose for which the withdrawals were being made." (R. 180, 181.)

oil and gas lease, and that he was refused either by reason of a mistake of law by the Department or the Secretary. The amended complaint being thus deficient it fails to state a cause of action. This seems to be settled by the cases of

Anicker v. Gunsburg, 246 U. S. 110;

Hodgson v. Federal Oil etc. Co., et al., 5 F. (2d) 442, affirmed in 274 U. S. 15;

Sullivan v. Mammoth Oil Co. (1927—8 C. C. A.), 22 F. (2d) 663, at p. 664,

where it is said:

"Asserting fraud and misrepresentation on the part of the appellees, and rights paramount to theirs, he asks that they be declared trustees for him with respect to the lease granted to them, and that he be invested as the lessee under that instrument with all the rights and obligations incidental thereto.

In order to sustain a claim and to obtain relief of this nature, 'it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship' between appellant and appellees. *Hodgson v. Fed. Oil & Dev. Co.,* 274 U. S. 15. But the bill in this case shows neither cotenancy nor correlation of any kind. The claims are adverse. Appellees are charged with having wrongfully appropriated the property rights of appellant more in the nature of trespass than of breach of trust.

'In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was

refused to him because of an erroneous ruling of law by the Secretary.' *Anicker v. Gunsburg,* 246 U. S. 110-117, 62 L. Ed. 603; *Hodgson v. Fed. Oil & Dev. Co., et al.* (8 C. C. A.), 5 Fed. (2d) 442-446, affd. 274 U. S. 15, 71 L. Ed. 901; *Devlin v. Central Wyo. Oil & Inv. Co.* (8 C. C. A.), 20 Fed. (2d) 530.

Under the foregoing decisions, appellant is foreclosed from substitution under the lease to appellee Mammoth Oil Co."

Not only is the amended bill of complaint devoid of any allegation to indicate a fiduciary relationship, or any relationship of any kind, between the petitioner and any of the respondents, and of any allegation of fraud by respondents, and of any allegation indicating that the petitioner had a better right to a prospecting permit or a lease on the premises involved in this suit, a right such as in law should have been respected by the officers of the Land Department and, being respected, would have given him the permit or lease, but, more and worse than that, the petitioner's case on the merits is utterly devoid of any evidence on any of these points, except affirmative evidence from the petitioner himself showing that he never applied for an oil and gas prospecting permit and that he never applied for a lease. (R. 106.)

See,

Brown v. Standard Oil Co., 45 Pac. (2d) 639 (Colo.).

If it be assumed that petitioner's theory, that he was entitled to personal notice of the Crum appli-

cation for a permit, is correct, the fact that he did not receive such notice does not help him. He still fails to show that he was entitled to a preference under Section 20 of the Leasing Act.

In *Bohall v. Dilla,* 114 U. S, 47, pp. 50, 51, this court said:

> "To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant."

And in *Lee v. Johnson,* 116 U. S. 48, another case in which it was sought to charge a patentee as trustee of the property, this court said, at page 50:

> "It is not enough, however, that fraud and imposition have been practiced upon the Department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is

sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In the circumstances of this case the petitioner cannot show that he was entitled to either a permit or a lease.

POINT FOUR.

THE PETITIONER HAS BEEN GUILTY OF LACHES IN THE ASSERTION OF HIS CLAIM.

Even if there were merit in the substantive claim of petitioner, the long delay in the assertion of it prevents the aid of a court of equity in the enforcement of it.

It is a truth too well established to require discussion, that the doctrine of laches is one which must be applied by a court of equity in accordance with the facts of the particular case before the court when the doctrine is invoked. *Badger v. Badger,* 2 Wall. 87, 92.

Where, as in the instant case, the property is of a highly speculative nature, the mere holding of it entails a very definite risk, and delay in asserting a claim to it will not be tolerated by a court of equity.

The facts material to the issue of laches in the present case are these. Drilling was done on the permit area, in close proximity to petitioner's surface homestead, and the money and enterprise of respondents contributed in very substantial measure to this drilling and to the consequent development of the property. The permit area included not only the lands

covered by petitioner's surface homestead in the North ½ of Section 30, but also the Northwest ¼ and the South ½ of Section 18, the Northwest ¼ of Section 32, and all of Sections 20 and 28, and the South ½ of Section 30, all in Township 21 South, Range 17 East, M. D. M. The above area, included within the single permit, Serial No. 09551, issued to Thomas Crum, was a unit for the purposes of development work, and development or drilling on any section within its limits was just as effective in a consideration of the laches of petitioner as drilling on the North half of Section 30.

It was shown by petitioner's own testimony that he knew that his lands were involved in a permit and that drilling was being done within the area included within that same permit. He testified that a well was drilling on Section 20, Township 21 South, Range 17 East (within the permit area) in 1924 (R. 91), and that he could see that drilling rig easily from the porch of his home at that time. (R. 98.) He testified that in the year 1928, or the spring of 1929, he was present many times at the site of a well then drilling on Section 28, again a well located within the area covered by the permit. (R. 98.) He testified that he saw drilling in 1927 on Sections 29, 28 and 34. (Section 28 is within the area covered by the permit, and Sections 29 and 34 are contiguous to that area.) (R. 99.)

Petitioner further testified that he knew, during 1928, 1929 and 1930, that wells were being drilled in Sections 28, 29, 34 and 26, all in Township 21 South,

Range 17 East, M. D. M. (R. 102.) He knew that the Crum permit covered Section 28, and that it also covered the North half of Section 30, his homestead. Yet, as he admitted on the trial, he did nothing in 1928, nothing in 1929, and nothing in 1930. As early as 1925, according to his own testimony, he had been told that he had a preference right to a permit to prospect for oil and gas. (R. 101.) As early as 1922 or 1923, he, being intimately acquainted with, and frequently (almost constantly) on the area involved, saw the boundary posts erected by the permitee. (R. 100, 101.) In 1928 he *inquired* of one Mr. Bottler, an attorney, concerning the permit covering his land (R. 100), and was told that the Crum permit covered his homestead. This, it must be remembered, was after he had been told that he had a preference right to such a permit; after he knew of his supposed rights. He knew in 1928 and long before, that wells were being drilled in sections on the permit area and close to it.

It is entirely clear that petitioner knew that his lands were involved in a prospecting permit, and that wells were drilling on the area covered by that permit. He knew that money and effort were being expended on those wells within the permit area, of which his homestead was a part. It was shown at the trial that respondents spent hundreds of thousands of dollars in developing this area. (See respondents' Exhibits "O" and "P", R. 222-224, R. 240-244.)[6]

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(6)Money expended within the limits of the Crum permit prior to July 1, 1931, are as follows: On Well 428-J, in Section 28, $27,311.83, by Pacific Western Oil Company, up to March 31, 1931, and $71,863.75, by

Knowing all these facts, petitioner did nothing in 1928, nothing in 1929, nothing in 1930, nothing prior to that time (R. 102), and not until he filed this suit in June of 1931, did he in any way assert any claim. (R. 106.) Furthermore, he testified that until 1931 he did not believe the lands were valuable for oil, that he was not interested in the minerals, and that not until the wells came in did he make up his mind that he wished to claim the preference right. (R. 101, 108.)[7]

We have, then, a claimant who, at the very least, and this is shown beyond question by his own testimony, was in possession of facts which would place any reasonable person upon inquiry concerning the situation which existed with regard to the prospecting permit. The cases show beyond any doubt that it is not necessary to bring home to one against whom the doctrine of laches is sought to be invoked, actual

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Kettleman North Dome Association, from April 1, 1931, to June 30, 1931, a total of $99,175.58 (R. 241-2); on Milham-Kennedy Well No. 1— 828-J, in Section 28, $204,703.13 to March 31, 1931, and $116,189.67 by Kettleman North Dome Association from April 1, 1931, to June 30, 1931 (R. 241-242); on Milham Well No. 25—now 2528-J, in Section 28, $119,002.40 prior to July 1, 1931. (R. 242.) Expenditures by Kettleman Oil Company and Pacific Western Oil Company jointly, represented by assessments paid to Kettleman North Dome Association on account of the area within the permit, exclusive of the portion of the permit area conveyed to Milham Exploration Company to June 30, 1931, were $742,071.91, of which $276,119.78 was paid on account of the North half of Section 30, Township 21 South, Range 17 East. (R. 243.)

(7) "Before 1931 I didn't believe that Section 30 was valuable for oil. It was when wells began coming in that I made up my mind to make claim to this preference." (R. 108, from condensed statement of testimony of Bourdieu.)

"I just stood still after learning that I had a preference right, and didn't do anything. I was not interested in the minerals. If anyone filed a permit I would have been notified. I didn't file an application with the Government for the right to drill for oil, and have not done so, nor for a lease. In July, 1928, when Mr. Bottler told me that the Crum permit to drill covered the North ½ of Section 30, I didn't do anything, and nothing in 1929, or in 1930. During all that time, I knew that wells were being drilled in Sections 29, 28, 34 and 26." (R. 101-2, from condensed statement of testimony of Bourdieu.)

positive knowledge of all the facts which would constitute an invasion of his claimed rights. In *Johnston v. Standard Mining Company,* 148 U. S. 360, the court said, at page 370:

> "While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.
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> * * * * * * *
>
> The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. * * *"

And see *Foster v. Mansfield etc. Railway,* 146 U. S. 88, *Wood v. Carpenter,* 101 U. S. 135, 141, and *Grymes v. Sanders,* 93 U. S. 55.

It is clear that the courts will not tolerate a delay by a party to enable him to decide whether or not it will be profitable for him to assert his alleged rights, and this principle, as well as the general principles applicable to the doctrine of laches when it is invoked in a case involving conflicting claims to oil property, is well expressed in the case of *Twin-Lick Oil Company v. Marbury,* 91 U. S. 587. In that case the

property in controversy had been purchased from the corporation which had first owned it by a director of the corporation. In buying the property, the director had committed no actual fraud and the corporators who, with the corporation itself, were complainants in the case, knew at the time of the purchase the facts upon which their right to avoid the sale depended. Four years later, after the property had become extremely valuable, and during which the complainants had in no way contributed to the development of the property (which was oil property), and during which they had assumed none of the risk attendant thereon, the corporators and the corporation filed a bill in equity praying for a decree that the defendant held the property as trustee for the company. This Court held that the doctrine of laches barred any decree in favor of the complainants. In the opinion appears the following language (at p. 592):

> "In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. *No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed in a court of equity.*"

At pages 592 and 593 the language employed by the court is so applicable and pertinent to the present case that we feel constrained to quote it here *in extenso:*

> "The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellee's counsel. The more important are as follows: *Badger v. Badger,* 2 Wall. 87; *Harwood v. R. R. Co.,* 17 id. 78; *Marsh v. Whitman,* 21 id. 178; *Vigers v. Pike,* 8 Cl. & Fin. 650; *Wentworth v. Lloyd,* 32 Beav. 467; *Follansbee v. Kilbreth,* 17 Ill. 522.
>
> The cases of *Bliss v. Edmonson,* 8 DeG, M. & G. 787, *Prendergast v. Turton,* 1. You. & Coll., while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.
>
> The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

And at page 516:

> "He cannot stand by and speculate on the chances. He cannot delay, and say, by his acts: 'it is mine, if it be a good thing. You may keep it, if it be a poor thing'."

See also *Hayward v. National Bank,* 96 U. S. 611, at page 618.

According to his own testimony the petitioner herein did not decide that he wished to assert a claim until the oil wells began coming in around his property. (R. 101, 108.) Thus he silently awaited the outcome of a speculative venture and then when it had proved successful and the risk was over, he decided to assert a claim to all the profits.

The cases establish the rule that where, during the interval of delay by the complaining party, changes have occurred in the value of the property or in the relations of the parties, equity will not countenance an injustice by enforcing the asserted claim.[8] The

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[8] Most substantial changes occurred in the Bourdieu property during petitioner's long delay: Milham-Elliot No. 1 well (commonly known as the Kettleman Hills Discovery Well) was completed on November 12, 1928, at a total cost of $326,667.09 (R. 241), and the now famous Kettleman Hills Oil Field became a known quantity in the oil world; Milham-Kennedy Well No. 1, now known as KNDA Well 828-J, was drilled, and an expenditure of $320,892.80 made prior to July 1, 1931 (R. 241); Milham Well No. 25, now known as KNDA Well 2528-J, was drilled at an expense of $119,002.40 prior to July 1, 1931 (R. 242); Well KNDA 428-J was commenced, and an expenditure of $99,175.58 made prior to July 1, 1931. (R. 241-2.)

Changes also occurred in the relations of the parties during petitioner's delay; on January 7, 1927, Kettleman Oil Corporation paid to Frank Kennedy the sum of $36,000.00 for the assignment of the Crum permit (including the Borden lands) (R. 240); on January 7, 1927, Kettleman Oil Corporation entered into an operating and drilling agreement with Milham Exploration Company (see Exhibit "O")—R. 222-22[illegible]; on March 9, 1929, Kettleman Oil Corporation conveyed to Pacific Western Oil Company an undivided one-half interest in these lands and in certain other lands, and Pacific Western Oil Company paid to Kettleman Oil Corporation the sum of $1,000,000.00 (Exhibits "T" and "U"—R. 226); on October 4, 1929, leases were issued by the United States of America to Kettleman Oil Cor-

controversy at bar involves an exceedingly speculative property right, and the principle announced applies, therefore, with especial force.

The opinion in the case of *Galliher v. Cadwell,* 145 U. S. 368 (at pages 371 et seq.) reviews some of the leading cases upon the doctrine of laches as it has been applied by this Court to controversies involving property, which during the interval of delay by the complaining party, has materially changed in value. The case forcibly illustrates the principle that a claimant may not sit supinely by while the property to which he subsequently lays a claim appreciates or depreciates, as the case may be, in value and then assert his alleged claim when changes in the value of the property have made it to his advantage to attempt to enforce his claimed right. After reviewing many cases the opinion states:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition of relations of the property or the parties. * * *"

The respondents in this suit could not be compensated by any decree for the risk which they assumed in developing the property involved. The case of *Patterson v. Hewitt,* 195 U. S. 309, is a leading case upon the

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poration and Pacific Western Oil Company (Exhibits "2-C" and "2-D") as a reward for the discovery of petroleum (R. 230); and on January 31, 1931, Kettleman Oil Corporation and Pacific Western Oil Company became parties to the famous Kettleman North Dome Unit Plan Agreement. (Exhibit "2-I"—R. 232.)

doctrine of laches. In that case the court said, at pages 320 and 321:

> "To award them (appellants) now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

The time necessary to constitute laches and thus bar relief in equity may be very short. In the *Patterson* case, supra, the court said of this (page 319):

> "Indeed in some cases the diligence required is measured by months rather than years. *Pollard v. Clayton,* 1 Kay & Johnson 462; *Atwood v. Small,* 6 Clark & Finelly 232.
>
> And in others a delay of two, three or four years has been held fatal. *Twin-Lick Oil Co. v.*

Marbury, 91 U. S. 587; *Hayward v. National Bank,* 96 U. S. 611; *Holgate v. Eaton,* 116 U. S. 33; *Hagerman v. Bates,* 5 Colorado App. 391; *Graff v. Portland Co.,* 12 Colorado App. 106."

Petitioner's theories do not prevent the application of the doctrine of laches. Petitioner makes the point that the doctrine of laches is not available to the respondents for the reason, as he states it, that he was in "undisturbed possession" of the land involved and was under no duty to act until disturbed in that possession. It is obvious that while that may be a correct principle of law when applied to a suitable case, it cannot apply in this instance. In the present case, the "undisturbed possession" which petitioner refers to is the undisturbed possession of the surface of the land. But that possession is not here material. *The oil and gas rights are all that are here involved.* Petitioner misconceives the nature of the controversy. The property involved is not the surface right, but the right to extract the oil. The real question is whether or not petitioner had notice (or had knowledge of facts which put him upon inquiry) of the possibility of an invasion of his claimed preference right to a permit. The only possible effect of actually entering upon the surface of Section 30 and drilling there would be to make it absolutely certain that petitioner had such notice. But it is already clear from the undisputed facts of the case that ample notice to petitioner that his claimed rights, if any existed, were being invaded was brought home to him long before this suit was filed.

Petitioner asserts (Petitioner's Supplementary Brief, p. 29) that only the receipt of personal notice of application for a prospecting permit could constitute due process of law to divest him of his claimed preference right. Petitioner gives no authority supporting that assertion. We cannot believe that petitioner's counsel means seriously to contend that Bourdieu, with actual knowledge of an invasion of his claimed rights, could sit supinely by and wait for a formal personal service of notice, and still not be affected by his delay, still not be subject to the application of the doctrine of laches.

It is obvious that petitioner is squarely in the position of one who avoids all risks attendant upon the holding or development of a highly speculative property, waits until the turn of events would make it highly profitable to assert a claim, and then and only then comes forward to claim the benefits of an enterprise with which he had no desire to associate himself before it became certainly profitable. He is laying a claim to all the benefits after avoiding all the burdens, all the risks, and all possibility of any loss. The authorities herein noted prove to a point of demonstration that courts of equity do not permit anyone to do this. There is no element lacking to make out a case of gross laches and it is respectfully submitted that petitioner must fail upon the sole ground of his inexcusable delay, if upon no other ground.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, if not on the ground that the courts have no jurisdiction of the subject matter of this suit, then on the ground that it clearly appears that the United States is an indispensably necessary party to a determination of questions which affect the interests of the United States. It is respectfully submitted, further, that if this court does not affirm the decision of the Circuit Court of Appeals, it should affirm the decision of the District Court.

Dated, San Francisco, California,
October 1, 1936.

HERBERT W. CLARK,
FELIX T. SMITH,
Solicitors for Respondents, Pacific Western Oil Company and Kettleman Oil Corporation, Ltd.

GEORGE W. NILSSON,
Solicitor for Respondent, Kettleman North Dome Association.

HERMAN PHLEGER,
Solicitor for Respondent, Frank Kennedy.

W. J. KENNEY,
Solicitor for Respondent, Franklin R. Kenney.

(Appendix Follows.)

Appendix

THE PICKETT ACT.

ACT OF JUNE 25, 1910, 36 STAT. 847, U. S. C. A. TITLE 43, SECS. 141, 142, 143.

An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Sec. 2. (As amended by the act of August 24, 1912, 37 Stat. 497.)—That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: **Provided,** That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the

(Note): As originally adopted on June 25, 1910, the portion of section 2 which appears before the proviso, contained the words "mineral other than coal, oil, gas and phosphates" instead of the words "metalliferous minerals".

diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: **Provided further,** That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: **And provided further,** That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: **And provided further,** That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado or Wyoming, except by Act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

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7-1

Department of the Interior
United States Geological Survey
Washington

Office of the Director

December 28, 1910

The Honorable,
The Secretary of the Interior.

Sir:

Information received from the field indicates that the following lands are valuable for oil, and I therefore recommend the submission of the following order of withdrawal to the President for appropriate action.

Very respectfully,
H. C. Rizer
Acting Director.

December 29, 1910.
Respectfully referred
to the President with ECF
favorable recommendation.
Frank Pierce,
Acting Secretary.

[Stamped]: Received Jan 3 1911 G. L. O.

[Stamped]: 99352 Received G. L. O. Jan. 3 1911

Reference to..... Assigned to W P W Answered by..... Noted..... Filed.....

[Written]: To R & R Visalia 1/3/11 W P W 'N"
"Div 1-5-11 Posted in N [illegible]

Special

December 30, 1910

Order of Withdrawal

Petroleum Reserve No. 16—California No. 7.

It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910:

~~T 2 1422734 2~~

7—2

Oil—California No. 7, p. 2.

Mt. Diablo Meridian, California.

T. 20 S., R. 16 E., Sec. 25, SW¼;
Sec. 26, all;
Sec. 34, E½;
Sec. 35, all;
Sec. 36, all.

T. 21 S., R. 16 E., Sec. 1, all;
Sec. 2, all;
Sec. 3, S½;
Sec. 4, N½ of NW¼, SE¼ of NW¼, NE¼ of SW¼, SE¼;
Sec. 9, N½ of NE¼, SE¼ of NE¼, NE¼ of SE¼;

Sec. 10, all;
Sec. 11, all;
Sec. 12, all;
Sec. 13, all;
Sec. 14, all;
Sec. 15, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;
Sec. 23, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;
Sec. 24, all;
Sec. 25, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;

T. 20 S., R. 17 E., Sec. 31, SW¼.

T. 21, S., R. 17 E., Sec. 6, all;
Sec. 7, all;
Sec. 8, all;
Sec. 16, W½ of NW¼, SW¼;
Sec. 17, all;
Sec. 18, all;
Sec. 19, all;
Sec. 20, all;
Sec. 21, W½ of NE¼, W½, W½ of SE¼, SE¼ of SE¼;
Sec. 26, SW¼ of SW¼;
Sec. 27, W½ of NW¼, SE¼ of NW¼, S½;
Sec. 28, all;
Sec. 29, all;
Sec. 30, all;

Sec. 31, NE¼, N½ of NW¼, SE¼ of NW¼, N½ of SE¼;
Sec. 32 N½, N½ of SW¼, SE¼.
T. 22 S., R. 17 E., Sec. 4, NW¼, E½ of SW¼.

99552-2

2

~~T 3 1422734 3~~

7—3

Oil—California No. , p. 3.

The area involved in this order is 18,480 acres, which will make a total area of petroleum withdrawals outstanding in California of 2,626,986 acres.

Wm H Taft
President.

Dec 31 1910
Referred to the Commissioner of the General Land Office for appropriate action. ECF

R A Ballinger
Secretary.

ACT OF JULY 17, 1914, 38 STAT. 509, U. S. C. A. TITLE 30, SECS. 121, 122, 123.

An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas, or Asphaltic Minerals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as

phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the non-mineral land laws of the United States, whenever such location, selection, entry or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: **Provided,** That all applications to locate, select, enter, or purchase under this Section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

Sec. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting

for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: **Provided,** That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location,

that the lands entered, selected, or located are in fact non-mineral in character.

Sec. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the non-mineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same."

ENLARGED HOMESTEAD ACT.

ACT OF FEBRUARY 19, 1909, 35 STAT. 639, U. S. C. A. TITLE 43, SEC. 218.

An Act to Provide for an Enlarged Homestead.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this Act, in the States of Arizona, California, Colorado, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah,

Washington, and Wyoming, three hundred and twenty acres or less, of *non-mineral,* non-irrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber located in a reasonably compact body, and not over one and one-half miles in extreme length: **Provided,** That no lands shall be subject to entry under the provisions of this Act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

Sec. 2. That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this Act, and shall pay the fees now required to be paid under the homestead laws.

Sec. 3. (As amended by the act of Mar. 3, 1915, 38 Stat. 756.)—That any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: **Provided,** That the land originally entered and that covered by

the additional entry shall have first been designated as subject to this Act, as provided by section one thereof.

Sec. 4. (As amended by the act of Mar. 3, 1915, 38 Stat. 756.)—That at the time of making final proof, as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by himself and two credible witnesses that at least one-sixteenth of the area embraced in such entry was continuously cultivated for agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-eighth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry: **Provided**, That any qualified person who has heretofore made, or who hereafter makes, additional entry under the provisions of section three of this Act to an entry upon which final proof has not been made, may be allowed to perfect title to his original entry by showing compliance with the provisions of section twenty-two hundred and ninety-one of the Revised Statutes, respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date of such original entry, but the cultivation required upon entries made under this Act must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry or upon both entries, must be cultivation in addition to that relied upon and used

in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvement made upon his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end the time within which proof must be made upon such a combined entry is hereby extended to seven years from the date of the original entry: **Provided further,** That where an entry is made as additional to an entry upon which final proof has theretofore been submitted by an entryman who still owns and occupies the land thus entered, the entryman in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date thereof, but the cultivation required upon entries made under this Act must be shown respecting such additional entry and must be performed upon the land included therein to the extent and for the period required in connection with the original entries under this Act, proof of which must be submitted within five years from and after the date of the additional entry: **Provided further,** That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence as required by section twenty-two hundred and ninety-one of the Revised Statutes.

Sec. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make

homestead entry in the States named in section one of this Act under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this Act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this Act shall be commuted.

Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence: **Provided,** That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

Sec. 7. That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands

subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: **Provided,** That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act as provided by section one thereof: **Provided further,** That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: **And provided further,** That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes. (This section added by the amendatory act of July 3, 1916, 39 Stat. 344.)

REGULATION 12 FROM OIL AND GAS REGULATIONS— ACT OF FEBRUARY 25, 1920, 41 STAT. 437. TAKEN FROM 47 LAND DEC. 437, AT pp. 444-446.

Preference Right of Owner of Surface.

Under section 20 of the act a preference right to a prospecting permit is given to an entryman or owner of land not claimed under any railroad grant, under

the following conditions: (1) The entry must have been made prior to February 25, 1920; (2) the entry must have been bona fide under and pursuant to the act under which made; (3) the entry must have been made without a reservation of the oil and gas, for land unwithdrawn, not classified as oil and gas land, and not known to be valuable for its oil or gas deposits, at date of entry; (4) in case the entry is patented, it must have been with a reservation of the oil and gas to the Government; if the entry is not patented, the entryman must waive all right under the entry to the oil and gas in the land; (5) if the entry has been assigned or transferred, such assignment or transfer must have been prior to January 1, 1918.

(a) Should an application for permit for entered or patented lands with a reservation of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve personal notice of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded.

(b) The preference-right applicant must show that he is entitled under the section above outlined, together with his qualifications, to hold a permit as previously set forth in these regulations, and if such an application be filed, the Secretary of the Interior will award the permit to the party entitled thereto.

(c) If the land, either withdrawn or unwithdrawn, is covered by an unpatented non-mineral entry **without a reservation** of the oil and gas content to the Government, a prospecting permit may not be granted so long as the entry subsists without such reservation. In cases where applications for prospecting permits are filed by persons other than the entrymen for land in this status such applications will be referred to the United States Geological Survey for classification as to the prospective oil value of the land affected. If the Geological Survey shall conclude and report that the land embraced in such a non-mineral entry is without prospective oil or gas value, the application for permit will be rejected as to such land; but if the Geological Survey shall report that the land has a prospective oil or gas value and offers a favorable opportunity for prospecting operations, then the General Land Office will direct the proper local officers to serve notice on the non-mineral entryman to the effect that said land has been reported as valuable for its oil or gas content, and that the said entryman will be allowed fifteen (15) days within which (1) to file in the local office his consent to a reservation to the Government of the oil and gas content of the land embraced in his entry and in which to exercise his preference right, if any,

to a prospecting permit for said land by filing a proper application therefor, or (2) to show cause, if any there be, why he should not consent to the mineral reservation, failing in either of which his entry will be canceled without further notice. The local office will thereupon report the action taken to the commissioner, whereupon (1) if the non-mineral entryman shall have failed to take any action, order of cancellation of the non-mineral entry will be made and action taken on the prospecting permit accordingly; (2) if consent to the reservation shall have been filed, a prospecting permit will be granted to the entryman or the former applicant, as the case may be, for the reserved mineral deposits; (3) if the non-mineral entryman shall submit a showing why the entry should not be impressed with a reservation of the mineral to the Government, such showing will be referred to the Geological Survey for consideration and report. If upon the receipt of such report the department shall conclude that the land is without mineral value, the application for prospecting permit will be rejected; but if the department shall conclude that, notwithstanding the showing made by the entryman, the land has a prospective oil and gas value, such action will be taken as the facts may warrant.

From the above it will be seen that it is desirable on the part of any applicant for a prospecting permit for land already embraced in a non-mineral entry without a reservation of the mineral, and likewise desirable on the part of any non-mineral entryman who is contending that the land is non-mineral in character, to submit with their respective applications

or showings as complete and accurate geological data as may be procurable, preferably the reports and opinions of qualified experts.

(d) In case of conflict between a preference-right claim under section 20 of the act and one claimed by virtue of section 18 or 19, the issue will be determined on the basis of priority.

(e) Claimants under this section of the act may combine their holdings for the purpose of making joint application for a permit, provided the aggregate area does not exceed 2560 acres and that all the lands for which application is made are within an area of 6 miles square or within the same township.

(f) The right of a permittee under a preference-right permit to a lease after discovery is governed by other provisions of the act, as set forth in section 8 of these regulations.

[Stamped]: Earned "M" S. H. W. 1404577-1

10— Y h— 4—003 9vvv

24— (Form approved by the Secretary of the Interior December 14, 1909.)

7 22

2-19-09
7-17-14
9- 5-14

[Stamped] Received
U. S. Land Office
Visalia, Cal.
Date Mar—6 1919
Hour 1:30pm

Department of the Interior

Homestead Entry
(Act of February 19, 1909)

[Stamped] Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 598).

U. S. Land Office, Visalia Calif. Serial No. 08309
Receipt No. 2281014
3-6-19

Application and Affidavit

I, Jean Bourdieu (male), a resident of Coalinga
(Give full Christian name.) (Male or female.)
Fresno Co, Calif., do hereby apply to enter, under the
(Town, County, and State.)
act of February 19, 1909 (35 Stat., 639), the Lots 1, 2, E^2 NW^4: NE^4; Section 30, Township 21 S., Range 17

E., MD Meridian, containing 322.89 acres, within the Visalia Calif, land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I have declared my intention to become a citizen of the United States,
(Applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application.)

(Declaration of Intention on file with Visalia 06903)

and am single & over 21 years of age; that my post-
(State whether the head of a family, married or unmarried, or over twenty-one years of age, and if not over twenty-one, applicant must set forth the facts which constitute him the head of a family.)

office address is Box 815, Coalinga, Calif.; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly

or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the homestead, timber and stone, desert land, or preemption laws (except H. E. 06950, San Francisco

(Here describe former entry or entries by section, township, range, land district, and number of entry; how perfected, or if not perfected state that fact.)

series for 160 acres in Sec. 33, T. 22, S. R. 14 E. MDM ~~not~~ relinquished; that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having person-

[Written on side]: "C" 06903 Oct 20, 1917. 101

ally examined same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral

land; that the land is not occupied and improved by any Indian; that the lands applied for do not contain merchantable timber, and no timber ~~except~~.....

.....

(Here fully describe amount and kind of timber, if any.)

Reference is made to letter "C" F NO. Visalia 06903, dated Oct. 20, 1917, authorizing applicant to make Second Entry

Posted in 101/105-Aug 4 1919 E.L.F. 9/26/19 Cross-posted Vol. 96/215 W.E.M."O".

1404577-2

and that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply ~~except the following areas:~~.....

(Give the subdivision and area of the lands, if any, susceptible of irrigation.)

Subject to provisions to and reservations and limitations of Act of July 17, 1914.

Jean Bourdieu

(Sign here, with full Christian name.)

(NOTE): Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 125, U. S. Criminal Code, below.)

I Hereby Certify that the foregoing affidavit was read to ~~or by~~ affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known ~~or has been satisfactorily identified before me by~~.....; that I verily

(Give full name and post-office address.)

believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Visalia, Calif.....,
(Town.) (County and State.)
within the Visalia Calif. land district, this 6th day of March, 1919

Carl A. Ferguson
Register.
(Official designation of officer.)

We, Hans R. Sumpf, of Coalinga Calif., and John E. Arnaud, of....."....", do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

Hans R. Sumpf.
John E. Arnaud.

I Hereby Certify that the foregoing affidavit was read to ~~or by~~ affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally know ~~(or have been satisfactorily identified before me by.....)~~; and that said affidavit was duly subscribed to before me at Visalia Calif. this 6th day of March, 1919

Carl A. Ferguson
Register.
(Official designation of officer.)

United States Land Office at Visalia Calif.

March 6, 1919.

I Hereby Certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909; that there is no prior valid adverse right to the same, and has this day been allowed.

Carl A. Ferguson

Register.

United States Criminal Code.—Chap. 6.

Sec. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years. (Act, March 4, 1909. 35 Stat., 1111.)

1404577-3

MAR, Authorized by "C", 2-25.
4—196

Department of the Interior 5/7/25"C"
United States Land Office 6/11 D
Visalia, California
Serial No. 08309 Orig
Register's Final Certificate
Homestead

(List each payment separately)

Comm. (Fin.),	$24.00	Rect. 2805310
Test. Fee	2.50	Rect. 2805310
Pur. Mon.,	$ 7.22	Rect. 2281014
Comm. (Orig.)	$24.00	Rect. 2281014
Fee	10.00	Rect. 2281014
Int., $.....		Rect. .....
.....		Rect. .....

Act of 2-19-09.

June 8, 1925.
(Date)

It is hereby certified that, pursuant to the provisions of Section 2291, Revised Statutes of the United States, Jean Bourdieu, Box 815, Coalinga, California, has made payment in full for Lots 1, 2, E½NW¼, NE¼ Section 30 Township 21 S., Range 17 E., M. D. Meridian, California, containing 322.89 acres.

Now, therefore, be it known that, on presentation of this Certificate to the Commissioner of the General Land Office, the said Jean Bourdieu shall be entitled

to receive a Patent for the land above described if all then be found regular.

W. S. Hunsaker, Register.

(NOTE): A duplicate of this Certificate is issued to the claimant.

The original is forwarded to the General Land Office, with the entry papers, for approval by the Commissioner of the General Land Office and issuance of patent.

The duplicate copy forwarded to the claimant should be held until notice of issuance of patent is received.

In all correspondence concerning the entry in connection with which this Certificate issued, refer to the Name of the Land Office and the Serial Number noted hereon.

Posted July 16/25 in Vol. 101, P. 105, by F. H. C., Div. "O."

Approved August 19, 1925.

By A. Gutierrez, Division "C."

[Stamped on face of foregoing document]:

Jun 8 1925

Marked "M" H. H.

Jun 8 1925

Patent to contain provisions, reservations, conditions and limitations of the Act of July 17, 1914 (38 Stat., 509). as to oil and gas.

Patent to contain reservation according to proviso to the Act of Aug. 30, 1890.

Pat No 967530

Oct 7 1925

The United States of America,

To all to whom these presents shall come, Greeting:

Whereas, a Certificate of the Register of the Land Office at Visalia, California, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Jean Bourdieu has been established and duly consummated, in conformity to law, for the Lots one and two, the east half of the northwest quarter and the northeast quarter of Section thirty in Township twenty-one south of Range seventeen east of the Mount Diablo Meridian, California, containing three hundred twenty-two acres and eighty-nine hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General:

Now Know Ye, That there is, therefore, granted by the United States unto the said claimant the tract of Land above described; To Have and to Hold the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by

the authority of the United States. Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat., 509).

In Testimony Whereof I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Wash-
(Seal.) ington, the Seventh day of October in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the United States the one hundred and fiftieth

By the President: Calvin Coolidge

By Viola B. Pugh, Secretary.

M. P. LeRoy

Recorder of the General Land Office.

Record of Patents: Patent Number 967530

[Written on face of the foregoing document]:

~~1367090~~

1404577-4

Petitioner's Exhibit No. 6. (R. 142-149.)

This exhibit consists of four documents:

(a) The homestead application of Lillian D. Harris, of Montana, dated May 24, 1904, bearing on

its face a stamp reading "This entry allowed subject to the provisions of the Act of June 17, 1902. (public No. 161)", and a stamp accompanied by some pen and ink writing which together read "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat. 509), as to oil and gas. J.T.K./N 1-19-25." The application did *not* "state that the same (is) made in accordance with and subject to the provisions and reservations of" the Separation Act of July 17, 1914, and, obviously, it could not have been made subject to that Act for the reason that the application was filed in May, 1904.

(b) A letter dated September 27, 1922, from the Commissioner of the General Land Office to Senator Myers, of Montana. This letter says, *inter alia,* first, that the entry of Lillian Harris (now Jamieson) was made under and is subject to the Reclamation Act of June 17, 1902, 32 Stat. 388, secondly, that "by Executive order of January 9, 1917, all of the above described land (meaning the land entered by Lillian Harris or Jamieson) was included in Petroleum Reserve No. 53"; and, thirdly, that "With regard to the entryman's right to the oil and gas in the land, you are informed that this office cannot undertake to pass upon this matter until a specific case involving the question is properly presented for adjudication in accordance with the regular procedure". And attention is called to the case of *Cleveland Johnson* (48 L. D. 18) in which the Department held, in effect, "that an equitable title does not vest in a homestead claimant until he has done all that the law and regulations

prescribe and that where there is a mineral discovery on the land, or where the land is classified or withdrawn as mineral, *before an equitable title has vested*[1] the homestead claimant must elect to receive a patent subject to the conditions and reservations provided in the Act of July 17, 1914 (38 Stat. 509) or suffer the cancellation of this entry."

(c) The decision of First Assistant Secretary Finney, dated July 15, 1924, in the matter of Lillian D. Jamieson, formerly Harris, who had appealed from a decision by the Commissioner of the General Land Office, which decision had required her to amend her homestead entry "so as to reserve deposits of oil and gas therein to the United States, subject to the conditions and reservations of the Act of July 17, 1914. (38 Stat. 509.)" The decision states, *inter alia,* that the Harris or Jamieson land "was withdrawn on August 18, 1902, in connection with the Milk River Irrigation Project, and entered by this appellant on June 3, 1904, pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388), and remains so withdrawn. *The entry was allowed without a mineral reservation, the lands then being neither withdrawn, classified, nor reported as valuable for oil or gas deposits."* The decision states further that "By Executive order of January 9, 1917, the area was withdrawn and included in Petroleum Reserve No. 53 and is still so reserved. This withdrawal formed the basis for the requirement of a mineral waiver, complained of by this appellant." The decision then states that the

1. If full equitable title has vested, an entryman is entitled to a patent pursuant to the terms of his entry.

entrywoman claimed that she had earned a vested right to an unrestricted patent or that, in the alternative, she was entitled to a preference right to a permit pursuant to Section 20 of the Leasing Act as against all other claimants. The decision then says "lands withdrawn and included in a Petroleum Reserve are prima facie valuable for such deposits (*Washburn v. Lane,* 258 Fed. 524; *State of Utah v. Lichliter et al.,* 50 L. D. 231); and unless final proof has been completed, including the payment of final fees and commissions, the Department must, in order to achieve the plain purposes of the Act of July 17, 1914, supra, require consent of and reservation of oil and gas deposits to the United States in lands theretofore[2] withdrawn, classified, or reported as valuable for such deposits. * * * Such reservation is required, of course, subject to the entryman's right to prove at a hearing that the lands are, in fact, nonmineral. * * * This provides means whereby mineral waiver may be avoided in proper cases. If the required mineral waiver is filed, appellant will be entitled to a preference right to permit to prospect for oil and gas, pursuant to Section 20 of the Leasing Act of February 25, 1920 (41 Stat. 437), as against Lysle S. Bartle, who has filed application for a permit to prospect for oil and gas pursuant to Section 13 of that Act." The Commissioner's decision was then affirmed.

2. Here the word "theretofore" refers to the fact that the Executive Withdrawal of January 9, 1917, antedated the completion of final proof and, therefore, prevented the vesting of full equitable title.

(d) An oil and gas prospecting permit dated August 4, 1925, to Lillian D. Jamieson, for the lands covered by her homestead entry.

This exhibit refers to the entry of Lillian D. Jamieson as having been made under the Reclamation Act of June 17, 1902 (32 Stat. 388), and, judging by the digest of the exhibit which appears at page 3 of the appendix to Plaintiff's Opening Brief, counsel for complainant think that the word "withdrawn" as it is there used, means withdrawn from all forms of settlement, location, sale or entry, just as the Executive Withdrawal Order of December 30, 1910, with which we are concerned in the case at bar, withdrew the Bourdieu lands from all forms of settlement, location, sale or entry. But that is simply not so, and counsel for the complainant have entirely misunderstood the meaning of their Exhibit 6. There are two withdrawals referred to in the exhibit. One is a withdrawal under the Reclamation Act, and it was made on August 18, 1902, and not 1920 as counsel say in their digest of this exhibit; the other is an Executive Withdrawal of January 9, 1917, which included the lands in Petroleum Reserve No. 53. The Reclamation Act withdrawal was made pursuant to the terms and requirements of Section 3 of the Act of June 17, 1902, c. 1093, 32 Stat. 388, U. S. C. title 43, Section 416, and that third section reads as follows:

> "The Secretary of the Interior shall, before giving the public notice provided for in section 419 of this chapter, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this chapter,

and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this chapter; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, *except under the homestead laws,* any public lands believed to be susceptible of irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this chapter; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry."

The words "except under the homestead laws", which we have caused to be italicized in the above quotation, show clearly that the lands involved in the *Jamieson* case were not withdrawn from homestead entry and that no attempt was made to withdraw them from homestead entry until the date of the Executive Withdrawal of January 9, 1917. It is clear, therefore, that Lillian D. Jamieson did not enter upon lands which had been withdrawn or classified or reported as valuable for mineral prior to the date of her entry. It is equally clear that she made her homestead entry in 1904 upon lands under a reclamation project, which

lands were, *thirteen years later*, and before she had finally proved up under her homestead entry, withdrawn from all forms of settlement, location, sale or entry by an Executive Order dated January 9, 1917, and included in Petroleum Reserve No. 53. The question passed upon by the Land Department in this *Jamieson* case was the question whether Jamieson had acquired an equitable title before the date of the Executive Withdrawal of January 9, 1917, so as to entitle her to an unrestricted patent to the entire premises, land, oil and everything else, or whether her case was such a case as was contemplated by Section 3 of the Separation Act of July 17, 1914. And it was held, and the fact that she got her oil and gas prospecting permit in 1925, against an applicant under Section 13 of the Leasing Act, proves that it was held, that she had entered her lands "bona fide as agricultural" and that they had been subsequently to the date of her entry withdrawn or classified as oil and gas lands. In other words, this *Jamieson* case was precisely a "case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry", and the entrywoman was clearly entitled to a preference under Section 20 of the Leasing Act.

We trust that the above analysis of Plaintiff's Exhibit No. 6 will show the court that there is no more resemblance between *Bourdieu's* case and the *Jamieson* case than there is between daylight and darkness. The *Bourdieu* case presents an instance of an entryman who entered lands which had been withdrawn or classified as mineral *before* the date on which he

entered them. The *Jamieson* case presents an instance of an entrywoman who entered lands bona fide as agricultural, which were withdrawn or classified as mineral *after* the date on which she entered them and before the date on which she completed her final proof.

Petitioner's Exhibit No. 15. (R. 150-158.)

This exhibit consists of three documents.

The first is the homestead entry application, dated August 29, 1918, of Hubert Francois, of Ventura County, California, under Section 2289, R. S.,—a general agricultural land law, for 161.28 acres of land. In the margin there is stamped the following: "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914 (38 Stat., 509);" but the application does *not* "state that the same (is) made in accordance with and subject to the provisions and reservations of" the Act of July 17, 1914, and this omission is in contradistinction to Bourdieu's application, which did state that proviso which the first section of the Separation Act requires to be stated in "all applications" made under that first section.

The second document is a letter, dated June 21, 1922, from the Commissioner of the General Land Office to the Register and Receiver at Los Angeles, California, in which the Commissioner says, *inter alia,* that on Nov. 16, 1921, one Lewis had applied for an oil and gas prospecting permit on lands covered in part by the homestead entry of the above mentioned

Hubert Francois whose entry had been made *"without oil and gas reservation"*; that under paragraph 12(c) of the Regulations under the Leasing Act, "the Director of the United States Geological Survey (had) reported that the geologic conditions existing under this land are such that opportunity for prospecting should not be denied. He, therefore, recommended that a prospecting permit be issued to the applicant entitled thereto"; that the homestead entry having been made prior to February 25, 1920, the entryman, Hubert Francois, was entitled to a preference right under Section 20 of the Leasing Act if he exercised his right promptly and at the same time filed his consent to a reservation of the oil and gas content to the government; that the entryman be notified of his right; that if he failed to exercise his right promptly it would be considered as waived.

The third document is an oil and gas prospecting permit, dated November 24, 1922, to Hubert Francois for the lands embraced in his homestead entry.

This presents another case of "lands entered bona fide as agricultural, and not withdrawn or classified as mineral at the time of entry." Specifically, it is another case of an entryman who was protected by Section 3 of the Separation Act of July 17, 1914—an entryman who entered upon lands bona fide as agricultural which were *subsequently* reported as being valuable for oil and gas. Bourdieu, in contradistinction to Francois, entered upon lands which had *theretofore* been "withdrawn or classified as mineral."

Letter from Director of the Geological Survey to the Secretary of the Interior, taken from U. S. Geological Survey Bulletin 623, at page 104:

February 24, 1908.

The Honorable,
The Secretary of the Interior,
Washington, D. C.

I have the honor to call your attention to page 15 (inclosed herewith) of the Daily Consular and Trade Report of the Department of Commerce and Labor, of Saturday, February 15, 1908, which directs attention to the superiority of liquid fuel, that is, petroleum products in one or another form, on steamships, and also to the policy of the British Government in using such liquid fuels as emergency fuel in battle ships; also to the editorial on page 3 of The Oil Industry of January 15, 1908.

It will be easy, if desired, to multiply the authoritative statements already in print concerning the superiority of liquid fuel for the Navy. For that reason I have to recommend that the filing of claims to oil lands in the State of California be suspended in order that the Government may continue ownership of valuable supplies of liquid fuel in this region where all fuel is expensive.

It is evident that the many reports on the superiority of liquid fuel that the question of its adoption is simply a question as to the price at which suitable petroleum products can be purchased.

The present rate at which the oil lands in California are being patented by private parties will make it impossible for the people of the United States to

continue ownership of oil lands there more than a few months. After that, the Government will be obliged to repurchase the very oil that it has practically given away.

The inadequacy of the coal supply of the Pacific Coast is well known to everyone who has made the subject of fuel a study. The local supply is derived entirely from a few mines on Puget Sound and one locality in eastern Washington. There are also some coal developments in Oregon, but no deposits here of a quality much above a lignite. In California the supply is limited to a small production of poor coal and coal briquettes about Mount Diablo, near San Francisco; and one mine in Monterey County, which is producing a small quantity of a fairly good bituminous which is not being marketed as yet, owing to poor transportation facilities. The great bulk of the coal used on the Pacific Coast is obtained from our western inland fields or from Australia.

Regarding the petroleum supply, the production last year did not meet the requirements of the trade, and the reserve stock was drawn on to meet the demand. At present the rate of increase in demand is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply.

Those areas in which the probabilities are greatest for striking commercial deposits of oil have nearly all been prospected with a drill and either proven or con-

demned. There are only a few areas of probable oil territory now remaining under governmental control, and these are rapidly being filed on and patented, either through legitimate oil development or by subterfuge, over claims for gypsum, etc. If anything is to be done regarding the matter, there is no question but that it should be done at once, for prospecting is now going on at an unprecedented rate throughout the West. All of the larger oil companies realize not only that the supply in the proven fields is limited, but that the area over which prospecting is liable to result favorably, is also restricted.

Very respectfully,

Geo. Otis Smith,

Director.

Letter from Director of the Geological Survey to the Secretary of the Interior, taken from U. S. Geological Survey Bulletin 623, at pages 133, 134:

September 17, 1909.

The Honorable,
The Secretary of the Interior.

Sir:

I have the honor to transmit herewith a copy of a letter addressed to your predecessor in February, 1908. The arguments presented in support of the recommendation made at that time are still valid, and they have been amplified in the Survey's Conservation report on the petroleum resources of the United States, a copy of which I submit herewith. In this report it is shown that the present production of

petroleum exceeds the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well known facts of the mode of occurrence of oil and the all too common practice of drilling wells close to boundary lines of private holdings that are being developed for oil, conservation of the petroleum supply demands a law that will provide for disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land.

I have the honor to also call your attention to the estimate in the petroleum report that at least one-half pint of lubricating oil is used for every ton of coal converted into power, and that this quantity of lubricating oil represents over a half-gallon of crude petroleum. Taking this into account as well as the increasing use of fuel oil by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use. I would therefore renew my recommendation that pending the enactment of adequate legislation on this subject, the filing of claims to oil land in the State of California be suspended.

In this connection it is important to note that acting on my report of June 4, 1909, classifying certain oil lands in California, the Commissioner of the General Land Office issued instructions to Registers and receivers to withhold those oil lands from agricultural

entry pending consideration of the question of legislation. The area of oil land affected by this action is about 427,000 acres, to at least 40 per cent of which the Government retains title. In several townships, notably T. 32, S., R. 22 E.; T. 32 S., R. 23 E.; T. 32 S., R. 21 E.; T. 30 S., R. 21 E.; T. 31 S., R. 23 E.; T. 31 S., R. 22 E.; T. 31 S., R. 24 E. of the Mount Diablo Meridian; and in T. 11 N., R. 24 W., and T. 12 N., R. 25 W., of the San Bernardino Meridian, there are compact areas of unappropriated oil land, each including from 6 to 16 contiguous sections.

Very respectfully,

Geo. Otis Smith,

Director.

Terms of the Withdrawal Order of September 27, 1909. (R. 183, 184.)

Withdrawal of September 27, 1909.

September 27, 1909.

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommendation which covers approximately 3,041,000 acres of which the larger part is probably private land and not affected by this withdrawal.

Temporary Petroleum Withdrawal No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public

domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

(Then follows description of lands.)

(From Appendix pp. 38-40, entitled "Digest of decisions and opinions in connection with the administration of the Act of February 25, 1920, as apply to oil and gas", published with General Land Office Circular No. 672, Government Printing Office 1920, approved March 11, 192[illegible], reprinted as amended to October 29, 1920, and containing "Regulations concerning oil and gas permits and leases" etc.)

Oil-land leases—Stock-raising homesteads.

The question has arisen as to whether or not the provisions of section 20 of the leasing act are applicable to lands covered by stock-raising homestead entries.

Section 20 is one of the so-called relief sections of the law, all of which sections are based upon alleged equities of the persons to whom a preference right to a permit or lease is accorded. It was designed to recognize the equities of persons who had gone upon the public domain and made homestead entries under the 160 or 320 acre homestead law, neither of which contains any reservation of minerals, upon the theory and

under the belief that they were obtaining an unrestricted title to the land. Because of a *subsequent* withdrawal or classification of the land as mineral after the allowance of their entries, and after they had spent their time and money upon the land, they were under the necessity of either losing the land entirely or accepting a patent under the provisions of the act of July 17, 1914, reserving the oil and gas deposits in the land to the United States. No such equity or reason exists in the case of entries under the 160 or 320 acre homestead law made upon lands *theretofore* withdrawn or classified as mineral, because the entryman knew at the time he made the entry that the mineral was known and reserved to the United States, and the most he could obtain was a patent expressly excluding the oil and gas deposits. This is true of all stock-raising homestead entries; for by the terms of the act itself all minerals within the land are expressly reserved to the United States, together with the right to enter upon the lands, mine and remove the same.

Lands within stock-raising homestead entries need not be withdrawn or classified for the purpose of preventing disposition of minerals under the agricultural land laws, because the minerals are reserved in the law itself. It is, therefore, clear that Congress, when it used in section 20 of the leasing act, the words "lands bona fide entered as agricultural and not withdrawn or classified as mineral at the time of entry", had in mind only the entries under the 160 or 320 acre homestead law, which contains no reservation or classification of mineral, and where *subsequently,* by reason

of a withdrawal or classification, the entryman was, as stated above, under the necessity of accepting a restricted patent. Any other construction of the statute would involve the disregarding of the language "and not withdrawn or classified as mineral at the time of entry".

The regulations specifically state that the preference right under section 20 of the act exists only where the land was entered prior to withdrawal or classification, and *subsequent* to entry was withdrawn or classified as oil or gas bearing in character. This clearly could have no application to entries under the stock-raising homestead law, where all minerals are reserved and where no withdrawal or classification is necessary.

Preferential rights of agricultural claimants.

Whatever preferential rights homesteaders or other agricultural entrymen as such may have to oil permits or leases must be found in section 20 of the act. While this section is not as clear and specific in some respects as might be desired, it is apparent that the class of entrymen or patentees on which Congress intended by this section to confer a preference right is those who made their entries when the land was *not withdrawn or classified* as mineral, and who were therefore permitted to make their entries without any reservation of the mineral to the Government, but were or will be compelled to take a patent with the reservation because of a withdrawal or classification of the land, or because in the meantime the land has become of known mineral character, before submission

of final proof. It is also apparent that this section is in the nature of a relief provision, designed to take care of those who found themselves in the situation above described at the time the act was passed, and not intended to provide generally for the disposition of mineral rights under the homestead law in the future.

With these general propositions in mind, the following specific statements may be made:

1. If the land was withdrawn or classified *at the time of entry* so that the entry was made with a reservation of the mineral, there is no preference right. Conversely, to entitle the homesteader to a preference right the entry must have been properly made *without a reservation* of the mineral.

2. There can be no preference right on an entry allowed after February 25, 1920. See section 12 of the regulations.

3. There can be no preference right on a stock-raising entry under the act of December 29, 1916, for under that act all entries are made with a reservation of the mineral.

4. If the homestead entry was made without reservation of the mineral, but after the lands were of known mineral character, and for the purpose of acquiring mineral rights, there is no preference right to a permit because (*a*) such an entry should have been made with a reservation of the mineral and the requisite nonmineral affidavit on which the entry was procured was fraudulent, and (*b*) the entry is not "of lands bona fide entered as agricultural".

5. But where one has an original entry under the 160 or 320 acre law and an additional entry under the stock-raising (640-acre) law, the entryman will have the same rights under the original as he would have had had he not made the additional.

6. Where one has an entry without a reservation of the mineral, nobody (not even the entryman himself) may acquire a permit or lease for the mineral so long as the entry stands in that shape.

7. But if the entryman in the case last above mentioned files a waiver of the mineral rights in the land, then he may exercise his preference right, if he has any, and if not, others may file application for a mineral permit or lease.

8. The "reservation" of the mineral above referred to is pursuant to section 2 of the act of July 17, 1914 (38 Stat., 509), which provides that the mineral occupant shall pay any damage caused to the agricultural claimant.

9. Where a patented entry, or one on which final certificate has issued, has been sold or transferred, the transferee would have the same rights as the entryman, provided he acquired the land before January 1, 1918, but if he acquired it after that date, there would be no preference right in anybody.

10. A patentee, or entryman with final certificate, with a reservation of the mineral to the Government, who has a preference right cannot withhold the land from development indefinitely. Section 12 of the regulations provides that if anybody else applies for a permit on the land, the preference-right man shall

be given notice and allowed 30 days within which to exercise his preference and apply for a permit himself; otherwise he will be out.

11. The preference-right claimant must be qualified to take a permit under the law the same as anybody else; for instance, an alien transferee of patented land could not get a permit or lease; one who has already received the limit of permits allowed could not get a permit.

12. The matter of whether the agricultural entry on which a preference right to a permit is predicated is within or without a known producing structure cuts no figure in connection with the preference rights here under consideration, provided that only one permit may be granted to the same structure.

13. In case of conflict between a preference-right claimant under sections 18 and 19 and one under section 20 the one would prevail whose rights were prior in their lawful inception.

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COUNTY
SAN BENITO
MONTEREY
COUNTY
COUNTY
COUNTY
COUNTY
COUNTY
COUNTY
COUNTY
KINGS
TULARE
KINGS
TULARE
COUNTY
RAILROAD INDEMNITY LIMIT
20 MILE LIMIT
RAILROAD GRANT LINE
20 MILE LIMIT
Hollister
Peachtree
SAN LORENZO RANCHO
Priest Valley
Los Gatos Creek
Kings River
Reyes River
Goshen
Hanford
Huron
Alcalde
Corcoran
Tule
Stone Canon
Parkfield
Salinas River
San Antonio River
TULARE LAKE
CHOLAME
Mc LURE
MONTEREY
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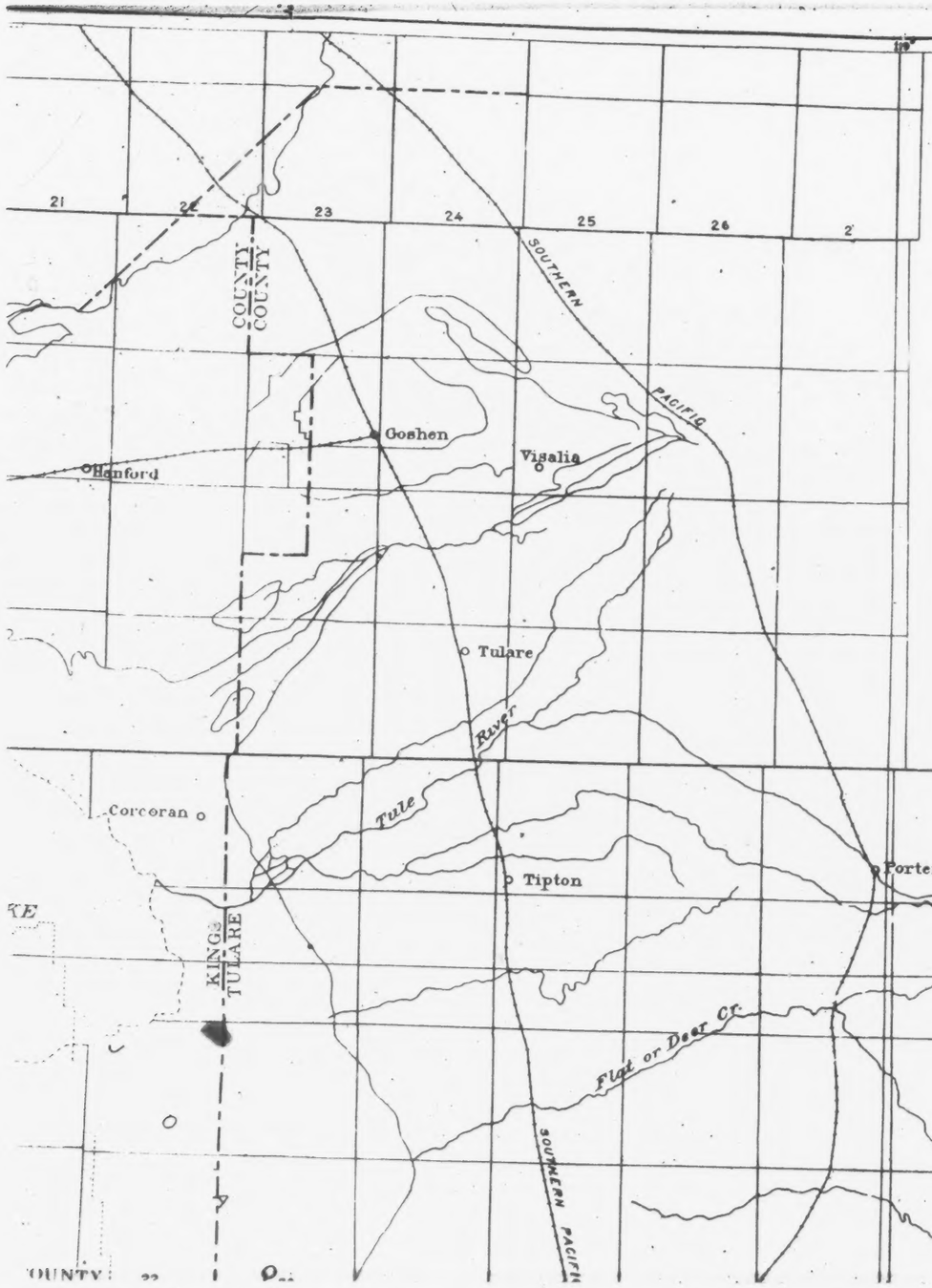
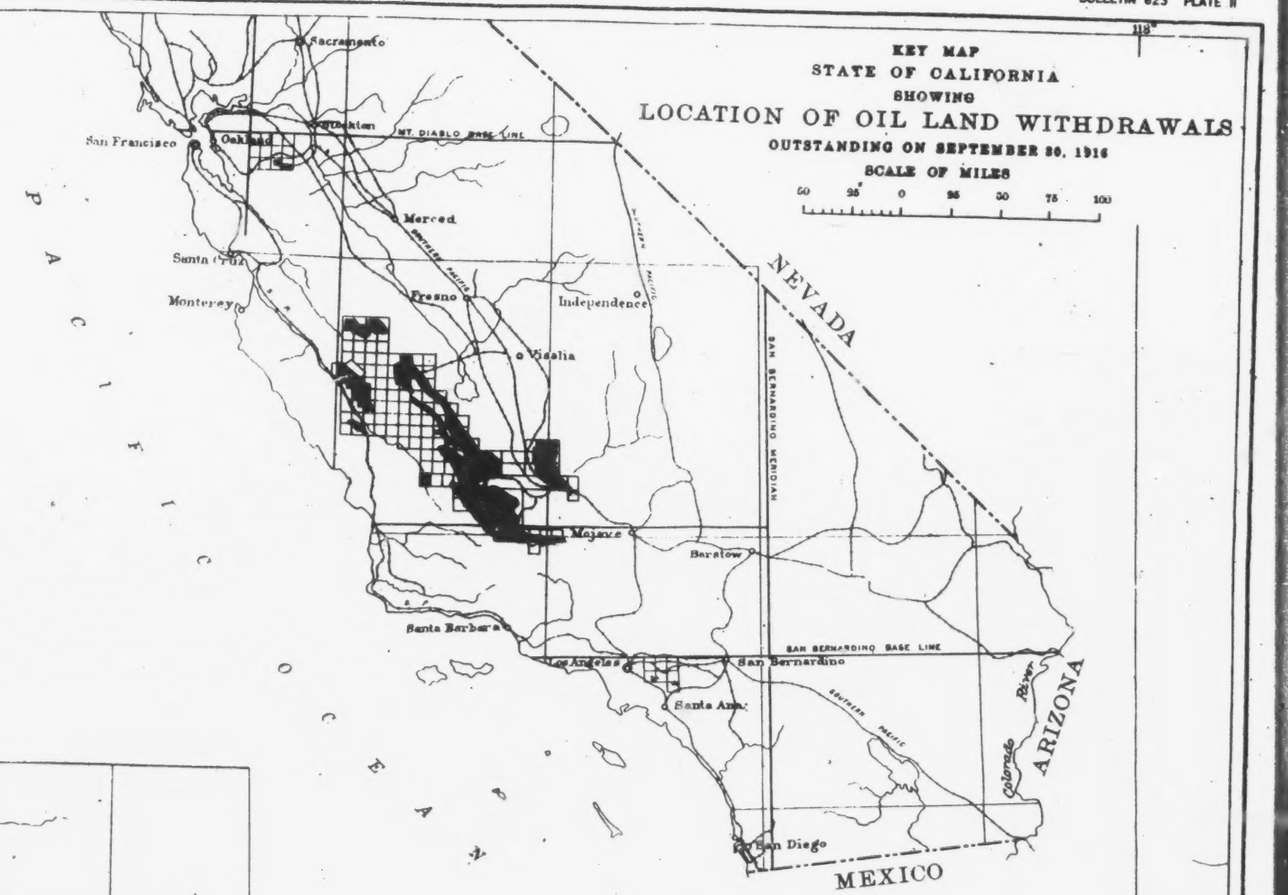


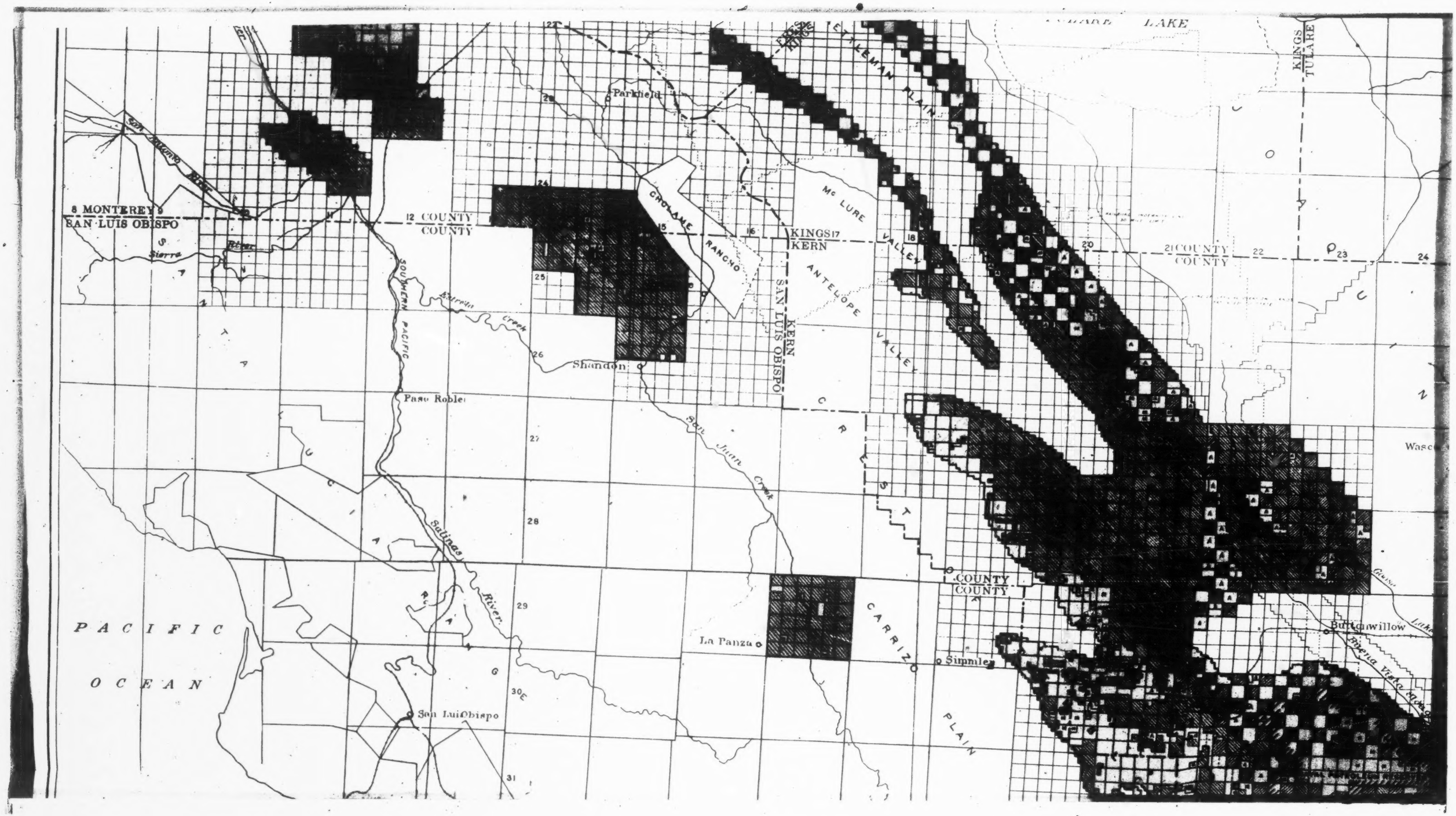


DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, SECRETARY

U. S. GEOLOGICAL SURVEY
GEORGE OTIS SMITH, DIRECTOR

MA. SHOWING

PETROLEUM WITHDRAWALS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KINGS
TULARE
ET ALEMAN PLAIN
Parkfield
SAN ANDREAS FAULT
CHOLAME
RANCHO
Mc LURE
VALLEY
ANTELOPE
VALLEY
8 MONTEREY 9
SAN LUIS OBISPO
12 COUNTY
COUNTY
KINGS 17
KERN
21 COUNTY
COUNTY
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Sierra
SOUTHERN PACIFIC
Estrella Creek
Shandon
Paso Robles
San Juan Creek
Salinas River
SAN LUIS OBISPO
KERN
COUNTY
COUNTY
CARRIZO
PLAIN
La Panza
Simmler
Buttonwillow
Wasco
PACIFIC
OCEAN
San LuiObispo

DEPARTMENT OF THE INTERIOR
FRANKLIN K. LANE, SECRETARY

U. S. GEOLOGICAL SURVEY
GEORGE OTIS SMITH, DIRECTOR

MAP SHOWING

PETROLEUM WITHDRAWALS

OUTSTANDING ON SEPTEMBER 30, 1916

IN THE

STATE OF CALIFORNIA

BASE MAP ENLARGED FROM GENERAL LAND OFFICE BASE
EDITION OF 1907

SCALE: 1 INCH = 8 MILES

LEGEND

Outstanding withdrawals September 30, 1916 — From Geological Survey records.

Naval Petroleum Reserves Nos. 1 and 2. — From Geological Survey records.

Lands patented to railroads. — From Land Office records, completed to April, 1915, by J. H. G. Wolf of the Bureau of Mines.

Lands patented, other than those to railroads. — From Land Office records, completed to April, 1915, by J. H. G. Wolf of the Bureau of Mines.

M — Lands covered by mineral applications for patent. — From Land Office records, completed to April, 1915, by J. H. G. Wolf of the Bureau of Mines.

A — Lands covered by nonmineral entries or selections. — From Land Office records, completed to April, 1915, by J. H. G. Wolf of the Bureau of Mines.

PACIFIC OCEAN

Paso Robles

San Luis Obispo

Port San Luis

Avila

Tesla

R 3 E. R 4 E. MD Mer.

Puente

Whittier

La Habra

Olinda

Fullerton

R 11 W. R 10 W. R 9 W. S B Mer.

Salinas River

San Juan Creek

La Panza

Simmler

CARRIZO PLAIN

COUNTY

COUNTY

Wasco

Buttonwillow

Lake

Riviera Weste Canal

Santa Maria River

Santa Maria

Cuyama

17 River

SAN LUIS OBISPO

SANTA BARBARA

ELKHORN HILLS

Wasioja

COUNTY

COUNTY

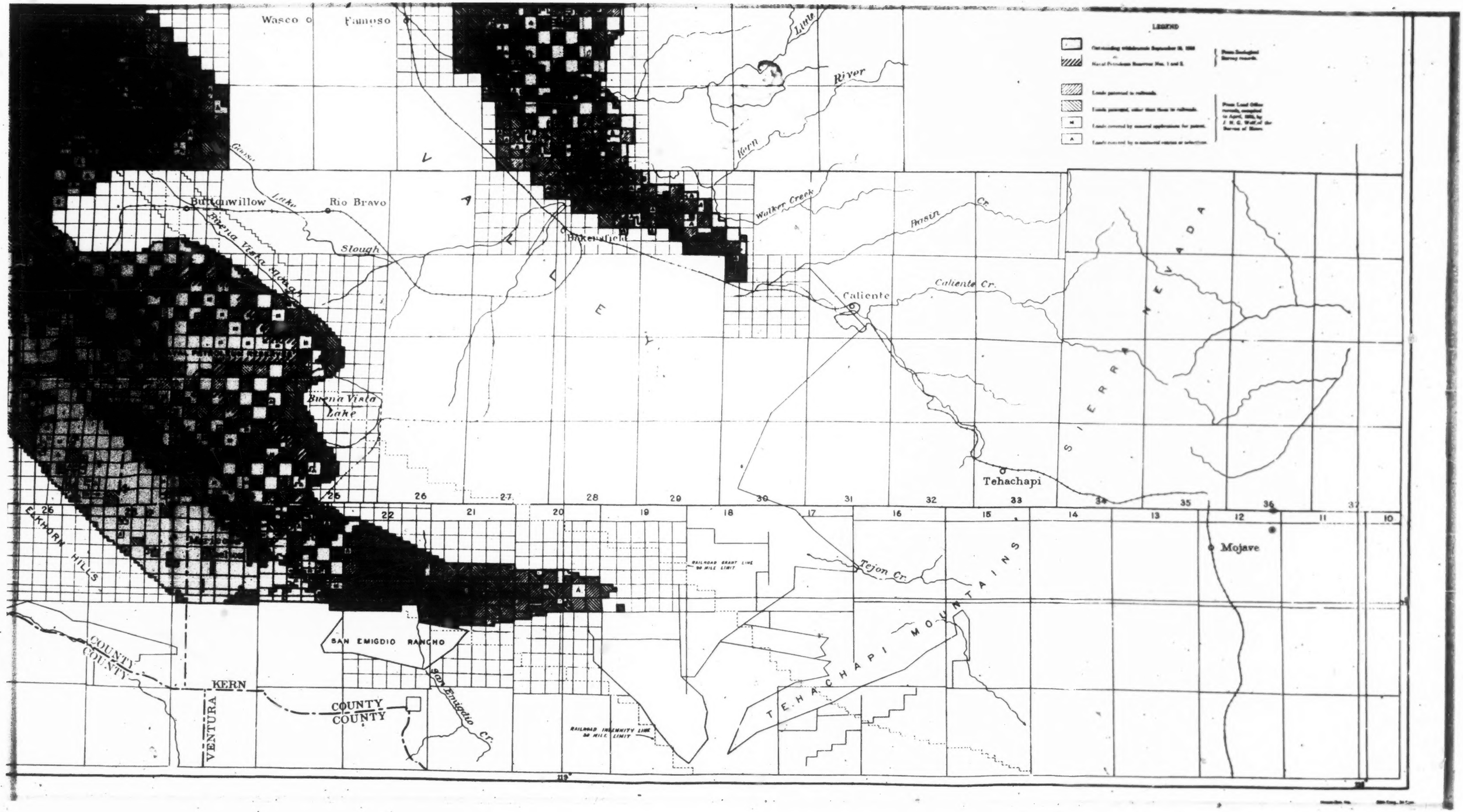
KERN

VENTURA

Sisquoc

River

120°


LEGEND
Wasco
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Rio Bravo
Riverlake Highway
Slough
Bakersfield
Walker Creek
Poso Cr.
Caliente
Caliente Cr.
Buena Vista
Lake
Tehachapi
SIERRA
NEVADA
MOUNTAINS
EXMHORN HILLS
RAILROAD GRANT LINE
20 MILE LIMIT
Tejon Cr.
TEHACHAPI MOUNTAINS
Mojave
SAN EMIGDIO RANCHO
COUNTY
COUNTY
KERN
COUNTY
COUNTY
VENTURA
San Emigdio Cr.
RAILROAD INDEMNITY LINE
20 MILE LIMIT

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CHARLES ELMORE CRO
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 2.

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith, et al.,

Defendants.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHIBALD DORMAN,
631 Van Nuys Bldg., 210 W. 7th St., Los Angeles, Cal.,
Solicitors for Petitioner.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Bourdieu, would show to Your Honors that, being aggrieved by the Decree entered in this case

on the 9th day of November, 1936, reversing the decision of the Ninth Circuit Court of Appeals, in dismissing the case on the ground of jurisdiction in the absence of the United States as a party defendant, and as grounds for this application, respectfully represents to the Court that, as will appear hereafter, this Court has been led into error of both fact and law in entering a decision on the merits against the petitioner.

The issue decided involves the construction of the statute granting the petitioner a preference right to prospect on his land under Section 20 of the Leasing Act. This particular issue was not presented to this Court either in oral argument or in the briefs, as it was not assigned as error in the Petition for Writ of Certiorari. The Circuit Court of Appeals did not pass upon this issue, nor was it asked to do so. In its opinion that Court states specifically that it has considered only the question of jurisdiction [R. 379] relating to parties. There is nothing in the decision indicating that this Court had in mind the cogent reasons which impelled the trial court to sustain petitioner's bill and rule that it stated a good cause of action both on demurrer and at the trial on the merits, when the former ruling was reaffirmed.

We quote herewith the decision *in extenso,* for the convenience of the Court:

> "This is a suit brought by petitioner against respondents to have impressed in his favor a trust in respect of a portion of a lease, executed by the United States, of oil and gas lands in the State of California.
>
> "The bill alleges that petitioner, since March, 1919, has been the owner and in possession of certain legal subdivisions of section 30, Township 21 South, Range

17 East, Mount Diablo Meridian, Fresno County, California, embracing 322.89 acres; that by reason of such ownership, he has been at all times since February 25, 1920, entitled to a preference right for a permit to prospect on such land for oil and minerals and, in case of discovery thereon, to a lease under the provisions of section 20 of the Leasing Act of February 25, 1920, 41 Stat. 437, 445, which provides —'In the case of lands bona fide entered as agricultura, *and not withdrawn or classified as mineral at the time of entry,* . . . the entryman or patentee, or assigns, . . . if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; . . .' The bill further alleges that petitioner made a *bona fide* entry of the land in question as agricultural; that the land was not withdrawn or classified as mineral at the time of his entry; that the entry was patented to him with a reservation of oil and gas to the United States under the provisions of the Act of July 17, 1914, 38 Stat. 509. In May, 1921, it is alleged, one of the defendants illegally and wrongfully and with knowledge of petitioner's rights, secured a purported permit to prospect for oil and gas on a large tract, which included the land described; that the issue of the permit was in violation of petitioner's preference right and operated to deny his right to procure a United States oil-and-gas prospecting permit to prospect thereon and to a lease in case of discovery, for the reason that no personal notice, as required by regulations of the Interior Department and the provisions of the Leasing Act, or notice of any kind, was given to petitioner, who had no notice of the issue of such purported permit until about the month

of July, 1928. The bill further alleges that Pacific Western Oil Company acquired from the original permittee all his right, title and interest in and to the permit, and that by reason thereof a lease was executed by the Secretary of the Interior to that company, granting the exclusive right to drill and explore for oil and minerals in said lands; that such company is now the legal owner of the lease, and wrongfully holds it in violation of petitioner's prior and superior equitable rights; and that the other respondents named have or claim, adversely to petitioner, some interest in the lands in question and the lease covering the same.

"An amendment to the bill, made by stipulation of the parties, alleges that petitioner's entry was made on March 6, 1919, and patent issued to him on October 7, 1925. Copies of the entry, with Land Office endorsements, and of the patent are attached and made part of the bill. The entry is in usual form and concludes, over the signature of petitioner, with the words, 'Subject to provisions and reservations and limitations of Act of July 17, 1914,' and was stamped by the Land Office, 'Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914.'

"The patent expressly excepts and reserves to the United States all the oil and gas in the lands patented, and to it, or persons authorized by it, the right to prospect for, mine and remove therefrom such oil and gas upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914. Section 1 of that act provides that lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, etc., shall be subject to entry, if otherwise available, under

the nonmineral land laws, when made with a view of obtaining title 'with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified . . . together with the right to prospect for, mine, and remove the same; . . . *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.' (C. 142, 38 Stat. 509.)

"There was also attached to the stipulation a copy of an order of withdrawal made by the President December 30, 1910, as follows:

'It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910: . . .'

"Among the lands described is the land here in question.

"In the district court, respondents moved to dismiss the bill on the grounds, first, that it did not state facts sufficient to constitute a valid cause of action in equity or at law against them or either of them; second, that the United States was an indispensable party to a complete determination of the suit; third, that petitioner was guilty of laches and his cause of complaint was stale. The district court

denied the motion without prejudice to a renewal later and, after answer by respondents, proceeded to a hearing on the merits. After such hearing it held that petitioner was not entitled to a preference right nor to a lease of the lands in question; that respondents Kettleman Oil Corporation and Pacific Western Oil Company were the owners in equal proportions of the oil and gas lease executed by the Secretary of the Interior to the latter company; and that petitioner be denied all relief.

"An appeal followed to the court of appeals. That court, without passing upon the merits, held that the United States was an indispensable party, which could not be sued for lack of its consent, for which reason that court and the district court were without jurisdiction; and upon that ground it dismissed the suit. 80 F. (2d) 774.

"The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under section 20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925. It appears, however, from the allegations of his bill and the exhibits attached, that the entry was subject to the provisions of the Act of July 17, 1914, among which is the limitation reserving to the United States all oil and minerals in the lands entered on account of which the lands so entered had been withdrawn or classified 'together with the right to prospect for, mine, and remove the same.' The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry, and reserved for classification . . .' Whether a 'classification' of the lands was effected by the order

we need not determine since it is clear that they were *'withdrawn' by the definite and unambiguous words of the order;* and, *as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn or classified.* It follows that the motion to dismiss on the first ground stated was well taken and should have been granted and the case ended without a hearing, which the district court unnecessarily ordered —evidently out of abundance of caution.

"Since, *plainly,* the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

"The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. *West v. Randall,* 2 Mason 181, 196 (opinion by Mr. Justice Story); *Cole Silver Mining Co. v. Virginia & G. H. W. Co.,* 1 Sawyer 685, 689 (opinion by Mr. Justice Field); Story's Equity Pleadings, 8th ed., sections 77, 96. And see *Russell v. Clark's Executors,* 7 Cranch 69, 98; *Elmendorf v. Taylor,* 10 Wheat. 152, 167-168. *Cf.* Equity Rule 39.

"We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. While the rule as stated is intended for the benefit of a plaintiff whose bill

sets forth a cause of action which he should, if possible, be given an opportunity to prove, the principle it embodies applies with equal, if not greater, reason to a case like this where the bill entirely fails to do so. In such a case, the obvious reply of the court to a suggestion that other parties are indispensible is that—since the bill states no cause of action against anyone, the rights of absent parties are in no way threatened by it, and to enter upon a consideration of the question of their indispensability would be a vain waste of time.

"If it be urged that the United States is an indispensable party and, hence, that the court may not proceed even to inquire whether the bill states a cause of action, the answer is that good sense suggests precisely the contrary. For a mere inspection of *the bill at once discloses that it states no cause of action* and, therefore, the United States is not an indispensable party, since it cannot be prejudiced by, and has no interest requiring protection in, a proceeding which at the threshhold is seen to be without substance. Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor.

"We are of opinion that the court of appeals should have disposed of the case in accordance with that view; and that the district court should have dismissed the bill upon the first ground stated in respondent's motion. Upon the question whether, upon

a good bill, the United States would be an indispensable party, we deem it unnecessary to express an opinion.

"The decrees of both courts below must, therefore, be reversed, and the cause remanded to the district court with directions to enter a decree in accordance with this opinion." (Italics supplied.)

In effect, the above opinion decides that the petitioner's case was entirely without merit. This conclusion is based upon the construction of the statute granting the preference right, and holds that, since it is admitted that the land involved had been "withdrawn" by executive order under the Pickett Act, that the petitioner was barred from asserting a preference right under the statute. The opinion overlooks the fact that the preference right to prospect was granted by the terms of the law to agricultural entrymen whose land was "not withdrawn . . . . as mineral at the time of entry." The decision proceeds on the theory that this qualification or limitation provided by Congress to defeat the preference right should be disregarded and that a withdrawal for any purpose is sufficient. We respectfully urge that a simple "Withdrawal Order" does not in law, and never has in practice, precluded the issuance of a preference right to prospect upon the part of the homesteader under Section 20 of the Leasing Act. As a matter of grammar the language of the statute cannot be so construed without doing violence to its terms and injecting ambiguity.

Literal Construction.

As a matter of law, in order to bar a preference right, Congress provided that the land must be "withdrawn as mineral at the time of entry." This is the literal meaning of the words used. We are not at liberty to insert a comma or period after the word "withdrawn," and thus eliminate the qualifying phrase, "as mineral at the time of entry." If a comma is inserted, as the Court has done, the negative "not" could not modify "classified." This changes completely the intent as expressed by Congress. The only situation which justifies a departure from the literal meaning is where there is ambiguity and the literal meaning cannot be given practical application. In the instant case this is not true, as the phrase, "withdrawn as mineral at the time of entry," is as old as the Land Department. Land was always withdrawn in this qualified sense when the Secretary, as a result of a contest or protest, determined that the land of an applicant was mineral in character. Land in the same general region as the land involved in this suit was "withdrawn as mineral land" in 1908 by operation of the existing mineral land laws, after it had been classified as mineral. This withdrawal was made without reference to any executive Order of Withdrawal, but was made pursuant to this established practice. The first exhibit in the "Book of Exhibits" [R. Vol. 2] shows thousands of acres of land within the blue line which were "withdrawn as mineral land" on June 17, 1908, by operation of the mineral land laws—not an executive Order. The land in issue in

this suit is marked in red and was excluded from such mineral land since it was classified as agricultural. No executive Order was issued on June 17, 1908, when this was done [R. 158-175]. In the *Cleveland-Johnson case* [R. 147], the land was "withdrawn as mineral at the time of entry" as a result of a protest, and the action taken thereafter referred to this practice, and not in distinction an Order of "withdrawal for classification," which had no application and which did not attach. All homesteaders were subject to withdrawal as mineral of their land. They were not subject to executive orders of withdrawal by reason of exemption under the Pickett Act.

The legal principle for which we contend in applying the literal meaning of the statute is clearly established by decisions of this Court. Chief Justice Fuller stated in 1904, in the case of *Johnson v. Southern Pacific*, 196 U. S. 369, at 370, that the literal meaning, as stated in the law, must apply. In that case the court had under consideration the language, "*coupled or uncoupled* without the necessity of men going between the cars." Although there were reasons for holding otherwise, this Court decided that the general clause, "without the necessity of men going between the cars," must modify both antecedents, "coupled or uncoupled." That this literal meaning must be applied in construing the statute in the case at bar is clearly established by the following decisions:

> "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all."
>
> *Johnson v. Southern Pacific* (1904), 196 U. S. 369, at 370;

United States v. Standard Brewery (1920), 251 U. S. 10;

Porto Rica R. R. v. Mor (1921), 253 U. S. 245;

Great West. R. R. v. Swindon (1885), 9 App. cases 808;

59 *Corpus Juris* 986.

The construction of the statute as to whether it means simply "withdrawn," with a period thereafter, and the elimination of the general phrase, "as mineral at the time of entry," was presented to the trial court in both oral argument and upon printed briefs. After a thorough consideration for the period of a year after submission in which the Court had in mind the application made by the Land Department, as well as the familiarity with which the phrase "withdrawn as mineral at the time of entry" was used by the Land Department, it decided that the literal meaning, "withdrawn as mineral land at the time of entry," was the correct construction, and the Court reaffirmed this construction in its opinion following the trial on the merits. Since that date respondents have not raised the question of construction in briefs or argument and did not present it to the Circuit Court of Appeals.

If we depart from this literal meaning of the words used by Congress, it is necessary to consider the resulting confusion and ambiguity. The preference right would thus be conferred upon all homesteaders whose land was "classified as mineral at the time of entry," contrary to respondents' contention, as the negative could not modify "classified" in that case. The construction "withdrawn,"

as applied by this Court, with a period inserted, necessarily implies, not withdrawn at any time or for any purpose. Such construction would result virtually in the elimination of any preference class, for most all public land had been withdrawn at some time for some purpose. The phrase, "at the time of entry," is indispensable to any clear understanding or application of the statute. It is so obvious that it must be qualified as to time and character that even respondents have not questioned that it must refer to "the time of entry," although they have insisted on excluding the words, "as mineral." This opinion will affect the practice in the future and the rights of many homesteaders under the law.

The only theory advanced by respondents is that Section 20 was an equitable provision for the benefit of homesteaders whose land was unjustly "withdrawn" by an executive Order at the time of entry. The trial court accepted this theory. Referring to such executive Orders of withdrawal, the Court in its conclusion states [R. 255]:

> "I think it is clear that it was classified as oil land by such withdrawal. . . .
>
> "The document amounts to nothing less than a classification of all of the section of land in which the area in suit is located and withdrew such oil land and from all entry of acquisition. . . .
>
> "The order of December 30, 1910, also establishes beyond doubt that the land involved in this controversy was classified as oil land by the Presidential action of that date. . . .

"Executive orders that entirely withdrew and classified land as mineral. . . .

"Executive orders that entirely withdrew land as mineral. . . ."

"The lands had been withdrawn and classified as mineral."

The Court states further [R. 258]:

"There were areas that prior to withdrawal or classification had been bona fide entered as agricultural land and on account of the executive orders all rights of such entrymen were inequitably and seriously impaired and threatened with destruction.

"It was intended to relieve bona fide agricultural entrymen from the stringent, drastic, and inequitable results of executive orders, that entirely withdrew and classified land as mineral."

From the above it is clear that the trial court held that the preference right of Section 20 was intended for agricultural entrymen whose land had been affected at some time by an executive order of withdrawal. In other words, they had been "withdrawn," but were not within the qualification provided by Congress. A simple Order of withdrawal, therefore, could not have defeated their rights. The question was, had their lands been withdrawn as mineral land at the time of entry? If the construction, "withdrawn," is insisted upon, there could be no preference class according to respondents' own theory and under the ruling of this Court.

Practice.

The practice in the Land Department shows that the construction, "withdrawn," cannot be applied and is contrary to the intent of Congress. We appreciate that this practice does not establish the law of the case, but, as this Court has frequently stated, the practical construction applied by the executive department affected must be considered. Practically all the land to whose owners a preference right has been issued under Section 20, had been "withdrawn" at some time, for some purpose. In practice, therefore, a simple "withdrawal" order did not defeat the preference right. Between the years 1900 and 1916 more than sixty-five million acres of public land were affected by a withdrawal order of some character at some time. Sometimes the stated purpose of the Order was for reclamation, power sites, or classification as specified in the particular Order. Preference rights under Section 20 have been issued in all three cases in which such Orders existed at some time and also where such orders were in effect at the time of entry. We refer to 48 L. D. 164, where instructions were issued in 1921 by the Department to the effect that the Carey Act withdrawals were entitled to the preference right. In all cases where a power site "withdrawal" was outstanding at the time of entry the entryman likewise has received a preference right.

We refer to our brief (p. 59) and to the exhibits introduced in evidence [R. 137, 142-148] to eight instances in which the preference right was issued to homesteaders although two different withdrawal Orders affected the land of each homesteader, viz.: a withdrawal for reclamation prior to his application, and a subsequent

"withdrawal" for classification during the time of entry. The record shows that they "remained so withdrawn" [R. 142]. All these homesteaders have received a preference right under Section 20. These exhibits establish that the practice followed by the Department in the practical construction and application of the statute required a qualified "withdrawal" to defeat a preference right. The law provides clearly that it must be a qualified withdrawal. The only qualification provided in the law is, "as mineral at the time of entry." If an executive order of "withdrawal," both prior and during the time of entry, did not defeat these nine homesteaders shown by the exhibits, and the number may be multiplied many times, how can such an Order, issued ten years prior to entry, defeat the preference right of the petitioner?

Not only in practice and in law must the statute be construed as "withdrawn as mineral at the time of entry" in order to bar a preference right, but as a matter of grammar it can be given no other meaning. Cogent reasons must be presented to justify any distortion of the language used, which is done when the construction "withdrawn" is applied. All these reasons of law, of practice, and of grammatical construction, impelled the trial court to decide, after careful study and extended argument and briefs, that it was a good bill and that the case must be tried on its merits. No appeal was taken from this decision and the Circuit Court has had no opportunity to pass upon it. This Court has held repeatedly that a point not raised in the Petition for

Certiorari to review a judgment of a Circuit Court of Appeals will not be considered by this Court.

Providence Co. v. Fidelity Co. (1936), 80 L. Ed. 385;

Zellerbach Paper Co. v. Hehring, 293 U. S. 172;

Hehring v. Taylor, 293 U. S. 507, at 511.

If it is urged that Congress must have intended to refer to any "withdrawal" Order made at any time, for any purpose, the complete answer is that Congress did not say so, and only the intent expressed in the Act can be considered. The words of Justice Sanborn, formerly of this Court, are applicable to this situation:

> "When a legislative body has made a grant or given a permission with a specific exception or limitation, and has made no other exceptions or limitations, a conclusive presumption arises that it intended to make none, and it is not the province of the courts to do so.
>
> * * * * * * * * *
>
> "But the power was conferred and the duty was imposed upon the members of Congress, and not upon the courts, to determine whether or not these exceptions to the express terms of the proviso should be made. They did not make them, and that fact raises a conclusive presumption that they did not intend to make them, and it is not the province of the courts to do so. (List of authorities.) . . . If, however, such an intention ever existed, it was a secret intention that was not expressed in the statute, and it is the intention expressed in the statute and that alone, to which the courts may lawfully give effect. They may not assume or presume

> purposes and intentions that the terms of the law do not indicate, and then enact and expunge provisions to carry on those supposed intentions. The act must be held to mean what it clearly expresses. (United States v. Ninety-nine Diamonds, 2 C. C. A. 9, 12, 139 Fed. 961, 964, 2 L. R. A. (N. S.), 185; Brun v. Mann, 80 C. C. A. 513, 525, 151 Fed. 145, 157, 12 L. R. A. (N. S.) 154.)"
>
> *Wabash R. R. v. United States,* 178 Fed. 5.

The words of Mr. Justice Brandeis, in the case of *Iselin v. United States,* are pertinent:

> "It must be assumed that Congress did not purpose to exempt from taxation this class of tickets. . . . The statute evidently was drawn with care. This language is plain and unambiguous. What the Government asks is not a construction of a statute, but in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." (List of authorities.)
>
> *Iselein v. United States* (1925), 270 U. S. 245, at 248.

The reasoning above is all the more forceful when the construction requires the omission of words which Congress has specifically provided. From the least favorable standpoint to petitioner, if it is urged that the statute is ambiguous, and that reasons exist which require the Court to disregard the literal meaning of the statute and apply another construction, then the facts surrounding the instant case and the practical construction made by the Department are of controlling importance.

We have presented briefly herein the reasons which governed the trial court in holding that the case presented a good bill. No argument on the merits involving the issue of construction was before Your Honors, and there is nothing in the Decree indicating that it was considered.

Wherefore, in view of the foregoing, it is respectfully urged that this application for a rehearing be granted, in order that this Honorable Court may pass on the question of construction of the statute and determine this issue, or in the alternative that the case be remanded to the United States Circuit Court of Appeals for further proceedings, and we humbly submit to the judgment of the Court if this application be without merit.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHIBALD DORMAN,
Solicitors for Petitioner.

Archibald Dorman, one of the solicitors for petitioner, hereby certifies that in his judgment the petition for rehearing is, in all respects, well founded, that the same is made in good faith, and is not interposed for the purpose of delay.

ARCHIBALD DORMAN.

SUPREME COURT OF THE UNITED STATES.

No. 2.—October Term, 1936.

Jean Bourdieu, Petitioner,
vs.
Pacific Western Oil Company, Kettleman Oil Corporation, Kettleman North Dome Association, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 9, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by petitioner against respondents to have impressed in his favor a trust in respect of a portion of a lease, executed by the United States, of oil and gas lands in the State of California.

The bill alleges that petitioner, since March, 1919, has been the owner and in possession of certain legal subdivisions of section 30, Township 21 South, Range 17 East, Mount Diablo Meridian, Fresno County, California, embracing 322.89 acres; that by reason of such ownership, he has been at all times since February 25, 1920, entitled to a preference right for a permit to prospect on such land for oil and minerals and, in case of discovery thereon, to a lease under the provisions of § 20 of the Leasing Act of February 25, 1920, 41 Stat. 437, 445, which provides—"In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, . . . the entryman or patentee, or assigns, . . . if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; . . ." The bill further alleges that petitioner made a *bona fide* entry of the land in question as agricultural; that the land was not withdrawn or classified as mineral at the time of his entry; that the entry was patented to him with a reservation of oil and gas to the United States under the provisions of the Act of July 17, 1914, 38 Stat. 509. In May, 1921, it is alleged, one of the defendants illegally

and wrongfully and with knowledge of petitioner's rights, secured a purported permit to prospect for oil and gas on a large tract, which included the land described; that the issue of the permit was in violation of petitioner's preference right and operated to deny his right to procure a United States oil-and-gas-prospecting permit to prospect thereon and to a lease in case of discovery, for the reason that no personal notice, as required by regulations of the Interior Department and the provisions of the Leasing Act, or notice of any kind, was given to petitioner, who had no notice of the issue of such purported permit until about the month of July, 1928. The bill further alleges that Pacific Western Oil Company acquired from the original permittee all his right, title and interest in and to the permit, and that by reason thereof a lease was executed by the Secretary of the Interior to that company, granting the exclusive right to drill and explore for oil and minerals in said land; that such company is now the legal owner of the lease, and wrongfully holds it in violation of petitioner's prior and superior equitable rights; and that the other respondents named have or claim, adversely to petitioner, some interest in the lands in question and the lease covering the same.

An amendment to the bill, made by stipulation of the parties, alleges that petitioner's entry was made on March 6, 1919, and patent issued to him on October 7, 1925. Copies of the entry, with Land Office endorsements, and of the patent are attached and made part of the bill. The entry is in usual form and concludes, over the signature of petitioner, with the words, "Subject to provisions and reservations and limitations of Act of July 17, 1914," and was stamped by the Land Office, "Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914."

The patent expressly excepts and reserves to the United States all the oil and gas in the lands patented, and to it, or persons authorized by it, the right to prospect for, mine and remove therefrom such oil and gas upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914. Section 1 of that act provides that lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, etc., shall be subject to entry, if otherwise available, under the nonmineral land laws, when made with a view of obtaining title "with a reservation to the United States of the deposits on

account of which the lands were withdrawn or classified . . . together with the right to prospect for, mine, and remove the same; . . . *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act." C. 142, 38 Stat. 509.

There was also attached to the stipulation a copy of an order of withdrawal made by the President December 30, 1910, as follows:

"It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled 'An Act to authorize the President of the United States to make withdrawals of public lands in certain cases,' approved June 25, 1910: . . ."

Among the lands described is the land here in question.

In the district court, respondents moved to dismiss the bill on the grounds, first, that it did not state facts sufficient to constitute a valid cause of action in equity or at law against them or either of them; second, that the United States was an indispensable party to a complete determination of the suit; third, that petitioner was guilty of laches and his cause of complaint was stale. The district court denied the motion without prejudice to a renewal later and, after answer by respondents, proceeded to a hearing on the merits. After such hearing it held that petitioner was not entitled to a preference right nor to a lease of the lands in question; that respondents Kettleman Oil Corporation and Pacific Western Oil Company were the owners in equal proportions of the oil and gas lease executed by the Secretary of the Interior to the latter company; and that petitioner be denied all relief.

An appeal followed to the court of appeals. That court, without passing upon the merits, held that the United States was an indispensable party, which could not be sued for lack of its consent, for which reason that court and the district court were without jurisdiction; and upon that ground it dismissed the suit. 80 F. (2d) 774.

The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under § 20 of the Leasing Act of 1920,

in virtue of his homestead entry in 1919 and patent in 1925. It appears, however, from the allegations of his bill and the exhibits attached, that the entry was subject to the provisions of the Act of July 17, 1914, among which is the limitation reserving to the United States all oil and minerals in the lands entered on account of which the lands so entered had been withdrawn or classified "together with the right to prospect for, mine, and remove the same". The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were "withdrawn from settlement, location, sale or entry, and reserved for classification . . ." Whether a "classification" of the lands was effected by the order we need not determine since it is clear that they were "withdrawn" by the definite and unambiguous words of the order; and, as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn *or* classified. It follows that the motion to dismiss on the first ground stated was well taken and should have been granted and the case ended without a hearing, which the district court unnecessarily ordered—evidently out of abundance of caution.

Since, plainly, the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. *West* v. *Randall*, 2 Mason 181, 196 (opinion by Mr. Justice Story); *Cole Silver Mining Co.* v. *Virginia & G. H. W. Co.*, 1 Sawyer 685, 689 (opinion by Mr. Justice Field); Story's Equity Pleadings, 8th ed., §§ 77, 96. And see *Russell* v. *Clark's Executors*, 7 Cranch 69, 98; *Elmendorf* v. *Taylor*, 10 Wheat. 152, 167-168. *Cf.* Equity Rule 39.

We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. While the rule as stated is intended for the benefit of a plaintiff whose bill sets forth a cause of action which he should, if possible, be given an opportunity to

prove, the principle it embodies applies with equal, if not greater, reason to a case like this where the bill entirely fails to do so. In such a case, the obvious reply of the court to a suggestion that other parties are indispensable is that—since the bill states no cause of action against anyone, the rights of absent parties are in no way threatened by it, and to enter upon a consideration of the question of their indispensability would be a vain waste of time.

If it be urged that the United States is an indispensable party and, hence, that the court may not proceed even to inquire whether the bill states a cause of action, the answer is that good sense suggests precisely the contrary. For a mere inspection of the bill at once discloses that it states no cause of action and, therefore, the United States is not an indispensable party, since it cannot be prejudiced by, and has no interest requiring protection in, a proceeding which at the threshhold is seen to be without substance. Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor.

We are of opinion that the court of appeals should have disposed of the case in accordance with that view; and that the district court should have dismissed the bill upon the first ground stated in respondent's motion. Upon the question whether, upon a good bill, the United States would be an indispensable party, we deem it unnecessary to express an opinion.

The decrees of both courts below must, therefore, be reversed, and the cause remanded to the district court with directions to enter a decree in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.